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No. 958

Supreme Court of the United States

OCTOBER TERM, 1962

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, United States Marshal, Southern District of Florida,

and

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MANUEL ARISTEGUIETA IN OPPOSITION

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TABLE OF CONTENTS

	Page
Questions presented	1
Counterstatement of the case	2
A. The extradition proceeding	3
B. The habeas corpus proceeding	11
Summary of reasons for denying the writ	14
Reasons for denying the writ	17
I. The statute authorizing federal judges to commit fugitives in extradition poses no substantial question under Article III of the Constitution	17
A. The theory of extradition under the treaties of the United States	18
B. The nature of the extradition judicial process in the United States	20
C. The effect of the extradition judge's determination and the executive function in extradition	28
D. The lack of merit in petitioner's attempted distinction of the commitment power	31
E. The doubtfulness of petitioner's contention that an Article III court could not conduct the extradition judicial process, and the lack of need to reach the question	34
F. The petitioner's other contentions relating to Article III	38
G. Petitioner's lack of standing to raise the question he seeks to present	42
H. Summary and conclusion	43
II. Embezzlement and other financial crimes committed for the private enrichment of the petitioner obviously are not within Article III of the Treaty excluding political offenses from extradition	45
III. Of the procedural issues raised by petitioner one is not even presented on this record and it and the others are without merit and of no general importance	54
Conclusion	60

INDEX TO CITATIONS

Cases: Page

Aristeguieta v. *Jimenez*, 274 F. 2d 206 (5th Cir. 1960), No. 1, Oct. Term 1962 ..... 7, 15, 40, 41, 42
Ball v. *United States*, 140 U.S. 118 (1891) 17, 57
Benson v. *McMahon*, 127 U.S. 457 (1888) 27
Bingham v. *Bradley*, 241 U.S. 511 (1916) 55
Cahill v. *Mayflower Bus Lines*, 7 F. Supp. 869 (S.D.N.Y. 1934), *aff'd*, 77 F. 2d 838 (2d Cir. 1935), *cert. denied*, 296 U.S. 629 (1935) 58
Chapman v. *Teets*, 241 F. 2d 186 (9th Cir. 1957) 38
Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 30
Collins v. *Loisel*, 259 U.S. 309 (1922) 43
Collins v. *Loisel*, 262 U.S. 426 (1923) 28, 43
Collins v. *Miller*, 252 U.S. 364 (1920) 15, 31, 39, 43
Connelly v. *United States*, 249 F. 2d 576 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958) 58
Dallemagne v. *Moisan*, 197 U.S. 169 (1905) 15, 33, 34, 58
Elias v. *Ramirez*, 215 U.S. 398 (1910) 55
In re Ezeta, 62 Fed. 972 (N.D. Cal. 1894) 49, 51
Factor v. *Laubenheimer*, 290 U.S. 276 (1933) 20
Fernandez v. *Phillips*, 268 U.S. 311 (1925) 47
First Nat'l City Bank v. *Aristeguieta*, 287 F. 2d 219 (2d Cir. 1960), No. 4, Oct. Term 1962 ..... 7, 15, 40, 41, 42
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 18
Frad v. *Kelly*, 302 U.S. 312 (1937) 39
Gallina v. *Fraser*, 278 F. 2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960) 51
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 42, 57
Glucksman v. *Henkel*, 221 U.S. 508 (1911) 16, 48, 51
Grin v. *Shine*, 187 U.S. 181 (1902) 17, 33, 39, 44, 57, 58
Hannah v. *Larche*, 363 U.S. 420 (1960) 41
Hayburn's Case, 2 Dall. 409 (1792) 24, 38
Jimenez v. *Aristeguieta*, 290 F. 2d 106 (5th Cir. 1961) 35, 41
In re Kaine, 55 U.S. (14 How.) 103 (1852) 14, 22, 23, 24, 35, 43
Karadzole v. *Artukovic*, 355 U.S. 393 (1958) 50
Kelly v. *Griffin*, 241 U.S. 6 (1916) 16, 48, 51, 55
In re Klein, 46 F. 2d 85 (S.D.N.Y. 1930) 44
Laubenheimer v. *Factor*, 61 F. 2d 626 (7th Cir. 1932), *aff'd*, 290 U.S. 276 (1933) 51
Lincoln v. *Power*, 241 U.S. 651 (1916), *affirming In re Lincoln*, 228 Fed. 70 (E.D.N.Y. 1915) 16, 51
Mactavish v. *Miles*, 263 Fed. 457 (D. Md. 1920) 37
McDowell v. *United States*, 159 U.S. 596 (1895) 17, 57
McGrath v. *Kristensen*, 340 U.S. 162 (1950) 30, 31, 34
The Margaretta, 16 Fed. Cas. 719 (No. 9,072) (C.C.D. Mass. 1815) 37
In re Metzger, 46 U.S. (5 How.) 176 (1847) 14, 21, 23, 35, 43

Page

In re Metzger, 17 Fed. Cas. 232 (No. 9,511) (S.D.N.Y. 1847) 21
In re Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960) 50
National Mut. Ins. Co. v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949) 42
Neely v. *Henkel*, 180 U.S. 109 (1901) 27, 47
Ornelas v. *Ruiz*, 161 U.S. 502 (1896) 45, 49
In re Oteiza y Cortes, 136 U.S. 330 (1890) 35, 47
The Palo Alto, 18 Fed. Cas. 1062 (No. 10,700) (D. Me. 1847) 37
Perkins v. *Elg*, 307 U.S. 325 (1939) 34
Pettit v. *Walshe*, 194 U.S. 205 (1904) 17, 58
Ramos v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959) 49, 51
Robertson v. *Baldwin*, 165 U.S. 275 (1897) 15, 36
St. Louis Southwestern Ry. v. *Henwood*, 157 F. 2d 337 (8th Cir. 1946), *cert. denied*, 330 U.S. 836 (1947) 58
Todd v. *United States*, 158 U.S. 278 (1895) 35, 38
United States v. *Burr*, 25 Fed. Cas. 2 (No. 14,692a) (C.C.D. Va. 1807) 20
United States v. *Clark*, 25 Fed. Cas. 441 (No. 14,804) (C.C.D. Mass. 1813) 36, 38
United States v. *Ferreira*, 54 U.S. (13 How.) 40 (1851) 24, 33, 35, 36, 38
United States v. *Robins*, 27 Fed. Cas. 825 (No. 16,175) (D.S.C. 1799) 25
United States ex rel. Karadzole v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959) 49, 50, 60
Ex parte Virginia, 100 U.S. 339 (1879) 22
Walshfer v. *Jacques*, 198 F. 2d 711 (6th Cir. 1952) 38
Ex parte Ward, 173 U.S. 452 (1899) 57
Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) 22

Constitution, Statutes, Rules and Treaties:

United States Constitution

Article III 1, 14, 15, 17, 18, 20, 21, 23, 24, 27, 30, 31, 33, 34, 35, 36, 38, 41, 42, 43, 56
Article IV, § 2(2) 19

2 U.S.C. §§ 206-23 37
18 U.S.C. § 3041 ..... 20, 27, 37
18 U.S.C. § 3043 37
18 U.S.C. § 3184 ..... 1, 2, 11, 14, 15, 23, 27, 28, 33, 34, 35, 57, 58
18 U.S.C. § 3185 ..... 27, 45, 47
18 U.S.C. § 3186 ..... 3, 27, 28, 35
18 U.S.C. § 3188 28
18 U.S.C. § 3189 39
18 U.S.C. § 3190 ..... 7, 10, 55
22 U.S.C. §§ 256-58 37

Page

28 U.S.C. § 296 39
28 U.S.C. § 332 39
28 U.S.C. § 459 37
28 U.S.C. § 2241(a) 38
Rev. Stat. § 1014 37
Rev. Stat. §§ 4079-81 33
Rev. Stat. § 5280 37
Rev. Stat. § 5292 37
Judiciary Act of 1789, § 33, 1 Stat. 91 ..... 15, 20, 21, 22, 37
Act of February 27, 1813, 2 Stat. 804 37
Act of March 10, 1838, § 3, 5 Stat. 213 37
Act of August 23, 1842, 5 Stat. 516 20
Act of August 12, 1848, 9 Stat. 302 23
Fed. R. Civ. P. 63 58
Fed. R. Crim. P. 40 37
Fed. R. Crim. P. 41 37
Jay Treaty of 1794, Art. XXVII, 8 Stat. 129 ..... 20, 21, 22, 25
United States-Venezuela Extradition Treaty, 43 Stat. 1698
Article I 3, 20
Article II 3, 47
Article III 2, 11, 16, 45, 52
Article XII 56
Article XIV 28, 48
United States-France Extradition Treaty of 1843, 8 Stat. 580 20, 21, 22
Webster-Ashburton Treaty of 1842, Art. X, 8 Stat. 576 ..... 22, 24, 27

Miscellaneous:

A Review of the Relations of the United States and Other American Republics, Hearings before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 85th Cong., 2d Sess. (1958) 54
6 Ops. Att'y Gen. 91 (1853) 28, 33
[1909] Foreign Rel. U. S. (1914) 49
8 The Works of James Buchanan (Moore ed. 1909) 23
4 Hackworth, Digest of International Law (1942) 49
2 Hyde, International Law (2d rev. ed. 1945) 49
1 Moore, Extradition (1891) 19, 49
Nixon, Six Crises (1962) 54
Deere, Political Offenses in the Law and Practice of Extradition, 27 Am. J. Int'l L. 247 (1933) 48
Harvard Research in International Law, Extradition, 29 Am. J. Int'l L. Supp. 15 (1935) 44, 48
Garcia-Mora, The Nature of Political Offenses, 48 Va. L. Rev. 1226 (1962) 48
Jacob, International Extradition: Implications of the Eisler Case, 59 Yale L.J. 622 (1950) 48

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MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, United States Marshal, Southern District of Florida,

and

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MANUEL ARISTEGUIETA IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the more than century old 18 U.S.C. § 3184, empowering a United States District Judge, on a showing of probable cause, to commit to jail an accused fugitive to await the action of the Secretary of State on a requisition by a foreign government for his surrender under a treaty of extradition, is unconstitutional under Article III of the Constitution because the Secretary, having received the judge's certification of his finding of probable cause, has discretion, in the conduct of foreign relations, ultimately to decline to surrender the fugitive.

2. Whether embezzlement of public funds and similar financial crimes, committed by petitioner, a former official of a foreign government, for his private financial benefit, constitute crimes of a political character or acts connected

with crimes of a political character immune from extradition under Article III of the Treaty of Extradition between the United States and Venezuela because when he committed his alleged crimes petitioner was the head of the foreign government rather than an official of more humble status.

3. a. Whether on the facts of this case the extradition proceeding against petitioner was "unfinished business" of a United States District Judge assigned to "perform the duties of district judge and hold a district court" in a district other than his own for a specified period "and for such further time as may be required to complete unfinished business" so as to permit the assigned judge to continue to hear the case after the specified period of his assignment expired when theretofore the proceeding had been in active litigation before him.

b. Whether petitioner, who is challenging his commitment by another judge and who never objected on this ground to the continued hearing of his case by the assigned judge, has standing to raise the foregoing question.

4. Whether petitioner was denied a fair hearing because the committing judge in an extradition proceeding may not have read all the evidentiary documents submitted in evidence by the demanding government, where substantial portions thereof related to uncontested matters or were matters of form, repetitious or immaterial, and where counsel for both parties submitted to the judge exhaustive memoranda and oral argument on all the evidence and issues in the case.

COUNTERSTATEMENT OF THE CASE

Following an extradition proceeding conducted on a complaint made on behalf of the Government of Venezuela pursuant to 18 U.S.C. § 3184, Chief Judge George W. Whitehurst of the United States District Court for the Southern District of Florida ordered petitioner committed to jail

to await the action of the Secretary of State under 18 U.S.C. § 3186. The Government of Venezuela has presented to the Secretary of State a requisition for the surrender of the petitioner to stand trial in Venezuela on charges there pending of embezzlement, criminal malversation, fraud, breach of trust and receiving money knowing it to have been unlawfully obtained. These are all crimes named in Article II of the Extradition Treaty between the United States and Venezuela, 43 Stat. 1698. By Article I of that Treaty each of the two nations agrees to "deliver up to justice . . . any person who may be charged with . . . any of the crimes specified in Article II . . . who shall seek an asylum or who shall be found within" its territories. By a petition for writ of habeas corpus in which he challenged on a number of grounds the legality of the extradition proceeding, petitioner sought release from the custody in which he was held pursuant to the extradition judge's order of commitment. The District Court for the Southern District of Florida dismissed the petition and discharged an order to show cause issued thereon. (Pet. App., pp. 29a-33a). The Court of Appeals for the Fifth Circuit affirmed the District Court's judgment in all respects. (Pet. App., pp. 1a-28a). Petitioner seeks review by this Court of the Court of Appeals' judgment.

A. The Extradition Proceeding

This respondent, the Consul General of Venezuela in Miami acting on behalf and on the instructions of his government, filed the initial sworn complaint for extradition against petitioner on August 24, 1959—nearly four years ago. (Tr. 459-61). The complaint was filed with District Judge Joseph P. Lieb of the Southern District of Florida, who on August 25 issued his warrant for the arrest of the petitioner. (Tr. 462). Apprehended, petitioner was immediately admitted to bail by Judge Emett C. Choate of that same district. (Tr. 463). He remained free on bail throughout the extradition proceeding and the ensuing

habeas corpus case until the Court of Appeals entered its judgment affirming the dismissal of his habeas corpus petition in December 1962; he was then jailed.

As amended in the manner subsequently described, the complaint charged the petitioner with two kinds of crimes, committed while he held high office in Venezuela in the period from 1948 until 1958.[1] The first category of crimes was murder or participation in murder in the deaths of four persons. The second was comprised of fifteen specific instances in which petitioner, in abuse of his office, misappropriated and otherwise unlawfully obtained funds from the public treasury of Venezuela. Petitioner does not in this Court raise any question as to the sufficiency of the evidence laid before the extradition judge in support of the charges of financial crimes; as explained hereafter, the homicides are no longer in the case. The court below adequately summarized the evidence. (Pet. App., pp. 20a-24a). Suffice it here to say that petitioner, in 1948 a man of modest means, funneled enough of the public wealth of Venezuela into his own pockets to become fabulously rich.

The charges in the extradition proceeding reflected charges pending against petitioner in the highest court of Venezuela, known until 1961 as the Federal Court and

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[1] Petitioner held power in Venezuela from November 24, 1948, until January 23, 1958. Until December 3, 1952, he was the leading member of a three-man junta. On that date, he became provisional President, and from April 19, 1953, until his government fell on January 23, 1958, he was President of Venezuela. He came to power as the result of a coup in which the legally elected government of Venezuela was ousted by the armed forces, and until July 1, 1953, he retained for himself the key position of Minister of Defense. (Tr. 1240-42, 1244, 1252-53, 2118, 2122).

Petitioner states (Pet., p. 8) that the coup that initially brought him to power took place in 1950 and overthrew a government in which the present President of Venezuela, Romulo Bentancourt, was President. That is incorrect. The date of the coup was November 24, 1948; the President of Venezuela at that time was Romulo Gallegos, legally elected the previous year as the peaceful successor to a junta of which Sr. Betancourt was a member.

thereafter as the Supreme Court of Justice. The charges were preferred by the Attorney General of Venezuela. (Tr. 1092-1128). The high court determined that there were grounds to proceed on these charges, issued its warrant for the arrest of petitioner on charges of murder and financial crimes and determined that his extradition should be requested. (Tr. 1074-90, 1129-49).[2] Extradition was necessary because petitioner had fled first to the Dominican Republic and thence to the United States. The filing of the extradition complaint followed.

On the day of his arrest on Judge Lieb's warrant petitioner moved to quash the warrant of arrest, challenging the sufficiency of it and the underlying complaint. (Tr. 464). This motion came on to be heard by Judge William C. Mathes, who was performing the duties of a district judge in the Southern District of Florida by assignment and designation of the Chief Justice. After hearing counsel on four separate days in September 1959 (Tr. 465-523, 536-55, 560-76) Judge Mathes quashed the original warrant of arrest, received an amended complaint (Tr. 524-35) and issued his warrant on that complaint. (Tr. 577-82).[3] Judge Mathes set a date in November when he was to return to Miami from his home district in California for further hearing.

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[2] The Venezuelan high court omitted from its warrant for the petitioner's arrest and its determination that his extradition should be requested the Attorney General's charge that petitioner fraudulently altered election returns in November 1952 in order to bring about his selection as provisional President. (Pet., pp. 9-10, 49 n.40).

[3] After issuing his warrant of arrest, which as noted was subsequently quashed, Judge Lieb took no further part in the case. In November 1959, while Judge Mathes was out of the district, petitioner applied to Judge Choate for an order relating to depositions, as he had in the case of bail; the order entered by Judge Choate had the effect of deferring to Judge Mathes ultimate decision on the question raised (Tr. 590-91), and Judge Choate took no further part in the proceeding.

Prior to the November hearing translation of the documents from the Venezuelan Supreme Court that had been sent to this country in support of the request for petitioner's extradition was completed, and these documents, including the court's orders and a part of the evidence on which they were based, were filed and served upon petitioner. (Tr. 583-84; see Tr. 1074-1225). Study of the documents made possible by their translation revealed that there was substantial additional evidence in Venezuela; measures to have such evidence sent to the United States were taken at once. In addition, the documents made it apparent that records of United States bank accounts of petitioner and some of his confederates would be highly relevant to the financial crimes charged and their production in evidence would curtail the amount of evidence needed from Venezuela.

An initial effort to compel production of some of those records was temporarily unsuccessful (Tr. 590-91), but at the hearing before Judge Mathes on November 23, 1959 (Tr. 605-86), he granted this respondent's motion for the issuance of subpoenas to certain banks commanding the production of the relevant records.

Also at that hearing, two amendments to the amended complaint (Tr. 591-603) were received, and a series of motions filed by the petitioner (Tr. 556-59, 584-88) were denied. (Tr. 687-91). Petitioner's counsel at this time was quite candid in stating that he would take advantage of every possible technicality (Tr. 645; see also Tr. 507-08), and he demonstrated this by objecting to the tender of the documents from the Venezuelan Supreme Court on the ground that a red ribbon attached to the United States Embassy's seal certifying the documents did not run through all the attached papers. (Tr. 632-33).[4]

At hearings before Judge Mathes in December and January it became plain that the United States bank records

[4] The documents were returned to Venezuela in order that this "error" might be rectified. (Tr. 632-41, 688-89).

would be produced, if at all, only after considerable litigation.[5] Therefore, counsel for this respondent, rather than cause a delay until the bank subpoena question was settled, undertook to reorganize and supplement the evidentiary material that was being received from Venezuela and proceed with the case on the assumption that the bank records would not be available. (Tr. 716-19). This was done. Documents were translated and reproduced and sent to petitioner's counsel at regular intervals in order that translations could be checked and to give petitioner full notice of the charges with which he was confronted. (Tr. 813-22). After agreement on translation was reached, the evidentiary documents were rearranged in logical order with fully informative tables of contents and were filed and served in April 1960; accompanied by an exhaustive Memorandum on the Facts that guided the judge to what was significant in the documents (which, in large part because of petitioner's insistence on technicalities, included many, many pages that did not need to be perused [see *infra*, p. 9, n. 8]). The memorandum also reproduced in original and translation a number of the key evidentiary documents. (Tr. 901-70).

Meanwhile, a second amended complaint was received by Judge Mathes on March 8, 1960, which spelled out in great detail the charges against petitioner. (Tr. 851-87). The evidence previously filed and served was offered and received on May 10 (Tr. 1071-72), subject to a motion to strike, which was briefed and argued and finally denied. (Tr. 2555-A). All the evidence of this respondent was submitted in documentary form pursuant to 18 U.S.C. § 3190; there were

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[5] See Aristeguieta v. Jimenez, 274 F.2d 206 (5th Cir. 1960); here on certiorari, 365 U.S. 840, as No. 1 of this Term. After the November 1959 subpoenas were ordered quashed, this respondent, with Judge Mathes' permission, moved to have the records produced as upon deposition. (Tr. 893-95). This move too was blocked. See First Nat'l City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960); here on certiorari, 365 U.S. 840, as No. 4 of this Term.

no live witnesses. Petitioner then filed a motion to dismiss, which was supported by a memorandum more exhaustive than this respondent's fact memorandum, in which petitioner treated of every issue of fact and law raised by this respondent's charges and the evidence in support of them.[6] The motion was argued before Judge Mathes for three days in September 1960,[7] and at the conclusion of the hearing Judge Mathes denied the motion without prejudice to its renewal when all the evidence on both sides was in. (Tr. 2705-06).

The next step was the taking of petitioner's testimony. Despite the notice he had had and the assurances he had given as far back as March that he was diligently preparing his case (Tr. 850) and the judge's provision that the hearing of his case should begin in September (Tr. 2519; see also Tr. 1061-66), he was not ready to proceed. A further hearing therefore was set for later in the month of September. At this time petitioner presented sketchy motions to take depositions of certain persons in Europe and Venezuela, which his counsel acknowledged were inadequate. (Tr. 2557-58). Judge Mathes gave petitioner the opportunity to support his defective motions with affidavits from the prospective deponents; he advised that any such affidavits should set forth in detail and as strongly "as the truth permits" the testimony they would give, with the thought that this respondent would be put to the choice of stipulating to receipt of the affidavits themselves or going to the expense, time and labor of attending at depositions. (Tr. 2761-62, 2764). The judge also fixed a date for hearing the testimony of any witnesses petitioner might care to produce to testify in person. (Tr. 2791-93). Petitioner submitted some affidavits from witnesses in Europe on the due date Judge Mathes had fixed. (Tr. 2798-2801).

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[6] The section of this memorandum dealing with the facts of the financial crimes is reproduced at Tr. 2556-2600.

[7] Portions of the argument are reproduced at Tr. 2600-2704.

So matters stood when the parties were advised by letter to counsel from the senior district judge in Miami that Judge Mathes was relieved and the case would be given to some other judge. (Tr. 2902-03). As was later revealed, Judge Mathes late in September 1960, following a conference among the chief judges of the Fifth Circuit and Judge Mathes' home circuit, the Ninth, and the Chief Justice, withdrew from all his pending cases in the Southern District of Florida, and this action was confirmed by the Judicial Council of the Fifth Circuit. Though believing its action probably unnecessary in view of Judge Mathes' own withdrawal, the Judicial Council directed that all matters that might be considered unfinished business of Judge Mathes in Florida be assigned to another judge. (Tr. 2793-98).

Chief Judge George W. Whitehurst of the Southern District of Florida took on the case (Tr. 2924-25) and at a hearing on March 21, 1961, at which petitioner's counsel fully acquiesced in the Chief Judge's assumption of the case (Tr. 2953-54), set up the procedure for further steps in the case. (Tr. 3012-13). These included the filing of memoranda by both sides designed to assist the Chief Judge in his analysis of the bulky documentary evidence that had been submitted on behalf of this respondent (Tr. 2992-95, 3013); such filings were made.[8]

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[8] For a variety of reasons this respondent's evidence ran to 2300 pages in English translation. Many of these pages were repetitious or dealt with quite incidental matters, some of them very technical, and a great deal of the evidence was not controverted in any way. Not the least of the reasons for the bulk of the evidence was petitioner's insistence that he was going to be technical. Thus, in order to prove, for example, that government contracts were executed at particular times, at particular prices and for certain material, this respondent was led to offer the full text of many such contracts, although their detailed terms were quite insignificant. Simply to prove the existence of a corporation and the names of its founders the whole corporate charter would be included. Furthermore, the form in which the evidentiary

In addition, Chief Judge Whitehurst set a date in late April for hearing petitioner's evidence and ruling upon his motions for leave to take depositions in Europe and Venezuela. Petitioner, who was personally present before the Chief Judge, was ordered to appear at that hearing. (Tr. 3013). Petitioner in April presented a few witnesses and introduced in evidence either by stipulation or waiver of objection the most important of the affidavits he had obtained from certain witnesses living in Europe. (Tr. 3079, 3108, 3170, 3262, 3397, 3400-01, 3414, 3416-17, 4211-14). He subsequently submitted a memorandum, at Chief Judge Whitehurst's suggestion (Tr. 3419), digesting these affidavits. (Tr. 4214-51). Leave to take depositions of the other proposed deponents was denied. (Tr. 3417, 4211-14).

This respondent submitted a small amount of rebuttal evidence, and final argument was heard by Chief Judge Whitehurst during the week of June 12-16, 1961. (Tr. 4313-15). The issues again were fully canvassed. The petitioner was personally present at the Chief Judge's express order. (Tr. 4214).

At the end of that hearing Chief Judge Whitehurst dismissed the murder charges but found that the evidence overwhelmingly established probable cause to believe the petitioner guilty of the financial crimes (Tr. 4253-54), that

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documents came to this country from Venezuela—authenticated in due form and certified to be so authenticated by the United States Embassy pursuant to 18 U.S.C. § 3190—meant that many pages covered by a single certification had to be included even though only a few pages of important evidence were among them.

[9] In response to Chief Judge Whitehurst's request for memoranda that would aid him in his consideration of the evidence, this respondent filed a brief paper guiding the judge to what was important in the evidence by reference to his previously filed fact memorandum and other documents. Petitioner refiled, with a new title and only two or three minor changes, the exhaustive memorandum he had previously submitted in support of his motion to dismiss. These documents were a part of the record transmitted to the Court of Appeals (see Tr. 258, Items 6, 7) but were not printed. They have been filed by this respondent with the Clerk of this Court.

these were crimes named in the Treaty of Extradition and that, having been committed solely for petitioner's private financial benefit, the crimes were not of a political character so as to be immune from extradition under Article III of the Treaty. (Pet. App., pp. 34a-39a). He found the evidence insufficient to connect the petitioner with the murders in which he was charged with participating.

In consequence, as directed by 18 U.S.C. § 3184, Chief Judge Whitehurst at once ordered the petitioner committed to the custody of the United States Marshal to await the action of the Secretary of State. (Pet. App., p. 34a). Likewise, pursuant to the statute, Chief Judge Whitehurst certified to the Secretary of State, along with the evidence he had received, his finding of probable cause, which, he stated, was made "upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein." (Pet. App., pp. 34a-39a).

The certifications to the Secretary of State were settled at an informal conference a week after Chief Judge Whitehurst announced his conclusions from the bench. In the course of this conference the Chief Judge made the remark quoted in the petition (Pet., p. 19) about his reading of the evidence.

That concluded the extradition proceeding.

B. The Habeas Corpus Proceeding

Before he presented his own evidence in the extradition case petitioner filed a premature petition for habeas corpus in which he claimed that he was entitled to be released from the "custody" in which he was held (in fact, he had been free on bail since the beginning of the extradition proceeding) by reason of the so-called Act of State doctrine. (Tr. 2-11). This is a point that he has abandoned in this Court. (See *infra*, p. 46, n. 32). An order to show cause was issued

on this petition (Tr. 11-12) but no further action had been taken by the time the extradition case ended.[10]

After the conclusion of the extradition proceeding petitioner filed an amended petition for habeas corpus alleging a number of infirmities in the extradition proceeding. (Tr. 63-76). His principal contention was that he had not received a fair hearing. He also alleged that the crimes charged were not within the Treaty, that there was no competent evidence to support the charges, that the crimes were political offenses or acts connected with political offenses, that Chief Judge Whitehurst had not properly acquired jurisdiction and that the Act of State doctrine forbade his extradition. He did not assert that Judge Mathes did not have jurisdiction because of the terms of his assignment to the Southern District of Florida or that neither Judge Mathes nor Chief Judge Whitehurst could constitutionally exercise the jurisdiction in extradition conferred upon them by statute.

An order to show cause was issued on the amended petition (Tr. 80) and the matter was heard before Judge William A. McRae, Jr., of the District Court for the Southern District of Florida. All the issues again were thoroughly briefed and argued (Tr. 267-422, 137-249), and Judge McRae at the conclusion of argument discharged the orders to show cause and dismissed petitioner's petition. (Pet. App., pp. 29a-33a).[11] This was on August 23, 1961.

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[10] The pendency of the habeas corpus petition, however, did provide petitioner with a vehicle for obtaining his release on bail promptly after his commitment by Chief Judge Whitehurst. Chief Judge Whitehurst refused bail, but petitioner's counsel immediately went before another judge of the District Court, who entered an order granting bail in the habeas corpus docket. (Tr. 61-63).

[11] It will be recalled that the original warrant of arrest issued by the Venezuelan Supreme Court of Justice and its determination that the extradition of the petitioner should be requested covered both the murders, which are now out of the case, and the

Petitioner appealed to the Court of Appeals for the Fifth Circuit. After briefing and argument on October 1, 1962, that court on December 12, 1962, issued its opinion and entered its judgment affirming the judgment of the District Court. (Pet. App., pp. 1a-28a). It disposed of every contention petitioner made, holding that he had had a fair hearing before a judge with statutory power to act, that there was competent evidence to support Chief Judge Whitehurst's finding of probable cause, and that petitioner's crimes were not political and were covered by the Treaty. The court also raised on its own motion and decided affirmatively—in agreement with the position then taken by petitioner—the question whether the judge who conducted the extradition proceeding could constitutionally be authorized to do so. (Pet. App., pp. 9a-10a).

* * *

After all this time and the opportunities—fully availed of—to be heard before three tribunals (four if Judge Mathes and Chief Judge Whitehurst are separately counted) petitioner comes to this Court urging as the principal reason for granting the writ a point he eschewed below when it was suggested by the court, that the extradition judge had no constitutional power to decide the case against him for the reason that the Secretary of State may yet conclude that he should receive executive indulgence and not be surrendered to Venezuela. He also sets forth in

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financial crimes. After Chief Judge Whitehurst's commitment of the petitioner and his certification to the Secretary of State, the Supreme Court of Justice, upon petition of the Attorney General of Venezuela, entered a further order on the charges of financial crimes against the petitioner. Based on that order, a formal requisition for the surrender of the petitioner for trial on those charges and those charges only has been presented to the Department of State by the Venezuela Ambassador. These documents were in the record before Judge McRae and the Court of Appeals. (Tr. 97-120, 126-27).

a new guise his contention that, whatever the extent of the crimes committed by him in abuse of his office, he is immune from extradition because he is a former head of government. And he raises—faintly—some procedural points of no general importance that were either adequately disposed of below or have long since been waived.

SUMMARY OF REASONS FOR DENYING THE WRIT

I.

There is no substantial question of the constitutionality under Article III of the Constitution of the extradition statute, 18 U.S.C. § 3184, insofar as it authorizes justices and judges of courts created under Article III to determine whether a fugitive should be committed to jail to await action of the Secretary of State in extradition. This Court has approved judicial proceedings in extradition, independent of executive control, as the appropriate means for determining whether an accused should be committed for action by the Secretary of State upon a showing by the demanding government of evidence of probable cause—that is, of evidence that would be sufficient to justify holding a fugitive if his crime had been committed here. Such approval was given both before and immediately after the statute that is now 18 U.S.C. § 3184 was enacted 115 years ago. *In re Metzger*, 46 U.S. (5 How.) 176 (1847); *In re Kaine*, 55 U.S. (14 How.) 103 (1852). The independent judicial hearing is designed to guarantee the protection of the rights of the accused.

A judge sitting in extradition does not act as a mere advisor to the Secretary of State. If his judgment is against the demanding government, it is binding upon the parties and the United States. A judgment in favor of the demanding government results in physical commitment of the fugitive to await the action of the Secretary of State and is a prerequisite to the Secretary's exercise of his power to surrender a fugitive.

In holding a hearing to determine whether a fugitive should be bound over for action by the Secretary of State,

a federal judge is doing precisely what he does when he sits as a committing magistrate in a preliminary hearing upon a charge of a domestic crime, a function he has been empowered to perform since the passage of the Judiciary Act of 1789. *Collins* v. *Miller*, 252 U.S. 364 (1920). The magisterial power of commitment, whether or not incident to a continuing criminal proceeding, has traditionally been regarded as a part of or an incident to the judicial power defined in Article III, *Dallemagne* v. *Moisan*, 197 U.S. 169 (1905); *Robertson* v. *Baldwin*, 165 U.S. 275 (1897), and its exercise by a judge of an Article III court, free from executive control, does not pose any threat to the independence of the judiciary or to the separation of powers doctrine.

By a simple change in the form of the statute, 18 U.S.C. § 3184, it could be made to vest jurisdiction in Article III courts free from constitutional doubts. In any event, it is clear from unquestioned statutes of long standing and decisions of this Court that federal judges may, consistently with Article III, be authorized to perform certain official acts other than acts that may be or are performed by the courts of which they are members. Commitment in extradition is that kind of act.

The pendency in this Court of Nos. 1 and 4, October Term, 1962, cases arising from the same extradition proceeding as is involved here and raising questions as to the scope of the powers of an extradition judge, does not make any more substantial than it would otherwise be the challenge made in the present petition to the power of such a judge to proceed at all, and therefore is not a reason for granting this petition.

II.

The extradition judge found that the evidence established probable cause to believe the petitioner guilty of financial crimes such as embezzlement, committed in abuse of his high public office and for his own personal enrich-

ment. The evidence was overwhelmingly to that effect, and there was no effort otherwise to explain it or to controvert it in any way. The crimes as to which probable cause has been found thus had no political purpose and were unrelated to any political disturbances, and the Court of Appeals correctly held that they were therefore not political offenses or acts connected therewith within the meaning of Article III of the Treaty of Extradition between the United States and Venezuela. Petitioner's position that he is immune from extradition for these crimes because he is the former head of a foreign government has no support whatever in the judicial opinions and other authorities that have established the contours of the political offense concept in United States extradition law. The contention, which would bend the law to serve the rank of the man, is frivolous. There is no occasion for this Court to review the judgment below in this regard.

Petitioner's alternative suggestion under Article III of the Treaty, that his crimes should be adjudged political because of alleged political enmity between him and the present government of Venezuela, is equally without substance. It is either an attempt to have this Court direct the judiciary to do what the Court has previously forbidden it to do, *i.e.*, to inquire in an extradition proceeding into the motivation of the demanding government in seeking extradition, *Lincoln* v. *Power*, 241 U.S. 651 (1916), *affirming In re Lincoln*, 228 Fed. 70 (E.D.N.Y. 1915); *Kelly* v. *Griffin*, 241 U.S. 6 (1916); *Glucksman* v. *Henkel*, 221 U.S. 508 (1911), or it is a frivolous suggestion that the character of the petitioner's crimes, which is what Article III of the Treaty deals with, can be affected by circumstances not attending their commission but rather their prosecution.

III.

The so-called procedural errors alleged by petitioner were not errors at all and in any event relate to facts unique to this case and are of no general importance. The participa-

tion of Judge Mathes in the proceeding after February 29, 1960, when his last assignment to the Southern District of Florida ran out except to complete unfinished business, was perfectly proper and in no way prejudiced petitioner, who in any event did not object to it. Similarly, petitioner agreed to Chief Judge Whitehurst's taking up the case and is therefore precluded by the *de facto* judge doctrine from objecting at this late date. *McDowell* v. *United States*, 159 U.S. 596 (1895); *Ball* v. *United States*, 140 U.S. 118 (1891). Moreover, it was perfectly proper for another judge to assume responsibility for the case after Judge Mathes withdrew, *cf. Pettit* v. *Walshe*, 194 U.S. 205 (1904); *Grin* v. *Shine*, 187 U.S. 181 (1902), and Chief Judge Whitehurst complied substantially with any statutory requirement there may have been that he issue his own warrant to bring petitioner before him for a hearing of the evidence. Chief Judge Whitehurst's certification to the Secretary of State stated that his judgment was based upon a consideration of all the evidence in this case; and his remarks at an informal conference held to settle the form of that certification, that he had not read all of the evidence, much of which was of such a nature that it did not need to be read, cannot impeach his considered, formal statement.

REASONS FOR DENYING THE WRIT

I. The statute authorizing federal judges to commit fugitives in extradition poses no substantial question under Article III of the Constitution.

As the main reason for granting the writ petitioner urges that this Court should take up the question whether judges of courts created under Article III of the Constitution may constitutionally sit as committing magistrates in extradition proceedings as they have since the earliest days of the Republic. That they have done so and may do so with perfect constitutional propriety is, as we shall show, not open to doubt. No further consideration of the question by this Court is needed. Certainly the question should not

be entertained at the request of this petitioner, who cannot claim to be prejudiced by the participation in his case of judges of an Article III court. Moreover, what he regards as the infirmity in their so participating, the possibility of executive indulgence and refusal to surrender him despite a judicial commitment, is not prejudicial but favorable to him.

The premise of petitioner's Article III question is that the extradition judge is a mere adviser to the Secretary of State. He says the extradition proceeding is "nothing more than an extrajudicial advisory adjunct to the executive power to extradite. . . ." (Pet., p. 30).[12]

The premise is false. Completely independently of executive control, the extradition judge exercises the traditional power of United States judges to sit as committing magistrates. In doing so he makes a final determination having vital consequences for the demanding government, the accused person and the United States, and this function is in no way incompatible with any limitations that may be inferred from Article III on the tasks that federal judges can be authorized to perform.

This becomes apparent upon analysis of the theory of extradition, the nature of the extradition judicial process and the meaning of the extradition statute.

A. THE THEORY OF EXTRADITION UNDER THE TREATIES OF THE UNITED STATES.

Extradition is a manifestation of the quest of sovereign nations in the last century and a half to establish some form of international order.

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[12] It is only the fact that the Secretary of State ultimately determines whether a fugitive should be surrendered that gives the slightest color to petitioner's argument. Every other element required by Article III to make a case or controversy cognizable even by an Article III court is present in an extradition proceeding. *Cf.* Fong Yue Ting v. United States, 149 U.S. 698, 728-30 (1893). It arises under a treaty of the United States, adverse parties present opposing claims, and a determination is made of issues of fact and law relevant under the treaty.

Ease of travel, and therefore the flight of criminals, has made it essential that steps be taken to prevent national borders from becoming shields for criminals. To prevent this, nations might have undertaken to enforce the criminal laws of other nations. But there are strong reasons for having the actual trial of guilt or innocence in the nation where the alleged crime occurred. 1 Moore, *Extradition* § 3 (1891).

This is the position taken in the treaties of the United States—and, indeed, of other nations.

That determined, it might be provided—and perhaps between some nations it is—that any demand by one nation for the surrender of an accused for trial under its laws will be honored by the nation where the accused is found. Such a scheme would make controlling the need for international comity. (Our Constitution provides for precisely such comity among the States in interstate rendition. Art. IV, § 2[2].)

But the United States does not sacrifice so completely the interest of the individual accused. Its treaties have struck a balance between inter-nation comity and the individual's interest by providing that surrender in extradition cannot occur except for crimes named in treaties and upon a prescribed quantum of proof of the accused's guilt.

The categories of crimes vary from one treaty to another. But the quantum of proof that must be presented by the demanding nation is the same in all our treaties.

For the specification of this proof, our treaty makers might have created some special standard. But they did not. They turned to something ready-made.

In the domestic criminal process both of the common law system and of the civil law system there is ordinarily an initial step—the preliminary inquiry to determine whether the evidence is sufficient to justify holding an accused in physical custody or on bail for further steps in the process. It was to the standard prescribed for this inquiry that the treaty makers turned. In our first extradition treaty, a

section of the Jay Treaty of 1794, it was provided that the quantum of proof would be

> "such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial"

if the offense alleged were a domestic crime. Art. XXVII, 8 Stat. 129; see *Factor* v. *Laubenheimer*, 290 U.S. 276, 290-93, 296 (1933). And so it has been provided in all our treaties in virtually uniform language. See United States-Venezuela Treaty, Art. I, 43 Stat. 1699.

In short, to protect the individual accused the treaty makers have applied to the alleged foreign crime the requirement obtaining in the case of domestic crimes: that if an accused is to be held for trial proof establishing probable cause to believe him guilty must be presented.

B. THE NATURE OF THE EXTRADITION JUDICIAL PROCESS IN THE UNITED STATES.

The Jay Treaty said nothing about who, in the asylum nation, should make the required preliminary inquiry into the sufficiency of the demanding government's evidence. Neither did this nation's first treaty devoted exclusively to extradition, the Treaty with France of 1843, 8 Stat. 580, which contained the quantum of proof provision of the Jay Treaty. Section 33 of the Judiciary Act of 1789, 1 Stat. 91, however, had made judges of Article III courts magistrates to arrest and commit offenders against the laws of the United States.[13] State justices of the peace and other magistrates were similarly empowered. Later—in 1842—the officers now known as United States commissioners also were given the commitment power, 5 Stat. 516, which today they share with judges of Article III courts and state magistrates, 18 U.S.C. § 3041.

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[13] Under this statute Chief Justice Marshall acted as the committing magistrate in the treason trial of Aaron Burr. United States v. Burr, 25 Fed. Cas. 2 (No. 14,692a) (C.C.D.Va. 1807).

Since the treaty makers contemplated that, when the United States was the asylum nation there should be no surrender unless the demanding nation made an evidentiary showing the same as that which must be made to judges acting as magistrates pursuant to Section 33 of the Judiciary Act, it was quite natural that those same judges should be deemed competent to arrest and commit for extradition just as for a trial of a domestic criminal charge. This was the practice under the Jay Treaty.[14]

Not long after the conclusion of the French Treaty, the practice of having a judicial proceeding in extradition in accordance with the process of Section 33 of the Judiciary Act was challenged in this Court in *In re Metzger*, 46 U.S. (5 How.) 176 (1847). Judge Betts, a judge of a district court, an Article III court, received an extradition complaint, caused the arrest of an alleged fugitive from France, heard the evidence of criminality in chambers, found it sufficient and committed the fugitive to "abide the order of the President of the United States in the premises." *Id.* at 177; see *In re Metzger*, 17 Fed. Cas. 232 (No. 9,511) (S.D.N.Y. 1847).

On an application for habeas corpus in this Court, a unanimous Court held that:

> "The mode adopted by the executive in the present case seems to be the proper one. . . .
>
> "Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly

[14] The best known case under the Jay Treaty was the case of Jonathan Robbins, discussed *infra* pp. 25-26, which was the subject of great public controversy. Some years later District Judge Betts, who had made a thorough study of the *Robbins* case, wrote that, "no where, in the severe scrutiny the subject underwent, does it appear an objection was raised to the competency of the judge [United States District Judge Bee] to arrest and commit by virtue of the" Jay Treaty. In re Metzger, 17 Fed. Cas. 232, 235 (No. 9,511) (S.D.N.Y. 1847); see also *id.* at 233.

> as we suppose, referred it to the judgment of a judicial officer. The arrest which followed, and the commital of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty." 46 U.S. at 188-89.

Indeed, Attorney General Clifford, in his argument to this Court, had urged that Section 33 of the Judiciary Act empowered the judge to act in the premises. *Id.* at 186.

The Court also held that since it had no appellate power over the action of a judge in chambers it had no jurisdiction "to examine into the cause of commitment. . . ." *Id.* at 191.[15]

Unlike the Jay Treaty and the French Treaty, Article X of the Webster-Ashburton Treaty of 1842 between the United States and Great Britain, 8 Stat. 576, which historically has been the most important of our extradition treaties, provided specifically for a proceeding before a judge or a magistrate to determine the probable cause issue as a prerequisite to any action by the Executive on the demanding nation's requisition for surrender. It added to the statement of the quantum of proof that had appeared in the Jay Treaty this clause:

> "[T]he respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the

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[15] In this aspect the case was subsequently described as one that "undoubtedly stands alone." In re Kaine, 55 U.S. (14 How.) 103, 133 (1852) (opinion of Nelson, J.). It was again questioned in Ex parte Yerger, 75 U.S. (8 Wall.) 85, 99 (1868). In Ex parte Virginia, 100 U.S. 339, 341 (1879), the Court said the authority of the case on this point "has been much shaken."

> duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

The quoted clause was borrowed by Congress almost verbatim as the heart of the original extradition statute, which was enacted in 1848, the year after the decision in the *Metzger* case. Significantly, legislation was sought by the Secretary of State (Buchanan) not because of any doubt as to the propriety of judges of Article III courts acting in extradition but because in the Northern District of New York there was only a single United States District Judge and needful swift action to apprehend fugitives from Canada could not be effected with him as the only available committing officer. State judges, it appeared, had refused to act and legislation was requested to provide specifically for their exercising the extradition function to supplement the federal judge. 8 *The Works of James Buchanan* 73 (Moore ed. 1909).

As finally adopted the statute elaborated "judges and other magistrates" in the Webster-Ashburton Treaty to read "any of the justices of the Supreme Court and the judges of the several District Courts of the United States —and the judges of the several State Courts, and the commissioners authorized so to do by any of the courts of the United States," and it expressly made it the duty of the magistrate, upon a finding of probable cause to believe the fugitive guilty of an extraditable crime, to commit him "to the proper gaol, there to remain until . . . surrender shall be made." 9 Stat. 302. Section 3184 of Title 18 as it reads today has come from that statute virtually without change.

The first case to reach this Court under the 1848 statute was *In re Kaine*, 55 U.S. (14 How.) 103 (1852), only four years later. The decision and its reasoning demonstrate — if further demonstration were needed after *Metzger*—how unsubstantial is the question petitioner seeks to raise. Issues going to the heart of the relationship between the

statutory judicial proceeding and the executive function in extradition were mooted and ruled upon, and, so far from being questioned under Article III of the Constitution, the propriety of an independent judicial proceeding in extradition was ringingly reaffirmed. And this was at a time when an Article III issue of the kind petitioner professes to see in extradition was fresh in the Court's mind. Just a year before in *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851), such an issue was resolved, and Chief Justice Taney in that opinion resurrected the teaching of *Hayburn's Case*, 2 Dall. 409 (1792), and brought to light the case of *United States* v. *Yale Todd*, which was decided in 1794 after *Hayburn's Case*.

In *Kaine's* case a fugitive from England had been arrested and committed after hearing by a United States commissioner under the recent extradition statute. On habeas corpus a circuit court dismissed the writ. The fugitive then moved for the writ in this Court. The principal ground for the fugitive's attack on his commitment was a contention, founded on language in the Webster-Ashburton Treaty, that an extradition complaint could not be entertained judicially unless the demanding government had first presented the matter to the Executive of the United States and the Executive had determined that it should be entertained, which had not been done in that case.

Eight Justices sat. All but one—Mr. Justice Curtis—ruled that the Court had jurisdiction.[16] Of the remaining seven, four in an opinion written by Mr. Justice Catron, held that, though this Court had jurisdiction, 55 U.S. at 116-17, the writ should not issue because an executive mandate was not required prior to the judicial commitment proceeding.

The prevailing opinion paraphrases the statute, point-

[16] The petition here twice cites the *Kaine* case. At page 29 it cites Mr. Justice Curtis' opinion (without explaining that it was joined by no one else) in support of a proposition never asserted by Mr. Justice Curtis; and at page 32 n. 20 it cites the case itself on the same proposition, a patent miscitation.

ing out that it vested jurisdiction to apprehend and commit for extradition in federal and state judges and in authorized commissioners. Then it says,

> "That an Executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that this executive act must be performed through the Secretary of State by order of our Chief Magistrate representing this nation." 55 U.S. at 110.

But it does not follow, says the opinion, that Congress cannot make the provision it did for arrest and commitment "preparatory to a surrender." It concluded that "no doubt is entertained" that "the judicial magistrates of the United States, designated by the act," are empowered to arrest and commit "on proof of criminality, as in ordinary cases when crimes are committed within our own jurisdiction, and punishable by the laws of the United States." *Ibid.*

The opinion then moves to the main issue—whether a mandate from the Executive is necessary before the judicial machinery can take hold of the case. Not so, it holds. The reason is to be found in the outcome of the controversy over the case of Jonathan Robbins,[17] which "had most materially aided to overthrow the administration" of President John Adams. *Id.* at 112.

The opinion introduces this discussion thus:

> "The people of this country could hardly be brought to allow an interference of the President with the Judges in any degree. The experiment was made during Mr. Adams' administration, in 1799, and signally failed." *Id.* at 111.

Robbins had been arrested by a federal judge in extradition under the Jay Treaty, but the judge had not acted.

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[17] See United States v. Robins, 27 Fed. Cas. 825 (No. 16,175) (D.S.C. 1799), where not only the judge's opinion but also many of the documents and debates related to the ensuing controversy are reproduced.

further until the Secretary of State wrote him saying that the President "'*advises and requests* you to deliver him up.'" *Ibid.* The judge then held a hearing "fairly enough," and as a result Robbins was delivered to the British. A country-wide storm broke out over alleged presidential interfegence with the judiciary. Despite a brilliant defense of the President by Congressman John Marshall,

> "a great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender, a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary, in cases of extradition, and which example might be made a precedent for similar invasions in other cases; and from that day to this, the judicial power has acted in cases of extradition, and all others, independent of executive control. . . .
>
> ". . . Public opinion had settled down to a firm resolve, long before the treaty of 1842 was made, that . . . an extradition without an unbiased hearing before an independent judiciary, [was] highly dangerous to liberty, and ought never to be allowed in this country. Congress obviously proceeded on this public opinion, when the act of 1848 was passed, and therefore referred foreign powers to the judiciary when seeking to obtain the warrant, and secure the commitment of the fugitive; and which judicial proceeding *was intended to be independent of executive control*, and in advance of executive action on the case." *Id.* at 112-13. (Emphasis added.) [18]

The judicial process in extradition, then, is far from being a mere "extrajudicial advisory adjunct to the execu-

[18] The three dissenting Justices, who included Mr. Chief Justice Taney, did not disagree with this assertion of the judiciary's independence of the Executive in its action in extradition. Rather they believed that if the foreign demand were first screened by the Executive irresponsible requests for extradition would be foreclosed before an initial arrest.

tive power in extradition," as petitioner asserts. (Pet., p. 30). Instead it is designed to be and is a primary protector of individual rights.

So, under the statute that is now 18 U.S.C. 3184, the judicial process is completely independent of the Executive. In order to assure that the rights of the accused in extradition should be fully protected, Congress, following the practice codified in the Webster-Ashburton Treaty, drew upon the undoubted power of judges of Article III courts and other judicial officers to pass on the commitment of alleged offenders and provided for a procedure in all respects like the preliminary hearing that is afforded to alleged offenders against the laws of the United States. *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888).[19]

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[19] As a further safeguard for those accused in extradition, Congress has limited the category of judicial officers who can act as magistrates more narrowly than it has in the case of domestic crimes. In addition to federal justices and judges, only commissioners especially authorized and judges of state courts of record and of general jurisdiction are given jurisdiction. 18 U.S.C. § 3184. In contrast, federal justices and judges, any United States commissioner and "any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justices of the peace or other magistrate, of any state . . ." may commit a domestic offender. 18 U.S.C. § 3041.

In 1900, in the aftermath of the Spanish-American War, Congress enacted a statute, 31 Stat. 656, now 18 U.S.C. § 3185, pursuant to which fugitives could be extradited from this country to foreign countries or territories occupied by or under the control of the United States. The ordinary extradition procedure was made applicable, except that Congress, apparently deeming this category of cases of particular gravity and delicacy, provided that the proceeding should be had "before a judge of the courts of the United States *only*, who shall hold [the fugitive] on evidence establishing probable cause that he is guilty of the offense charged." (Emphasis added.) The statute was attacked on a variety of constitutional grounds in Neely v. Henkel, 180 U.S. 109 (1901), and sustained. Proceedings under 18 U.S.C. § 3185 may still be had only before United States judges, and surrender of a fugitive committed by a judge is made by the Secretary of State who has the same discretion to decline to surrender as he has with respect to persons committed under § 3184. See 18 U.S.C. § 3186.

C. THE EFFECT OF THE EXTRADITION JUDGE'S DETERMINATION AND THE EXECUTIVE FUNCTION IN EXTRADITION.

What happens in extradition is this:

Pursuant to Section 3184, the demanding nation files a sworn complaint with the judicial officer. The accused is arrested and brought before the judge or other magistrate for a hearing of the evidence. The judge determines which if any of the charges in the complaint are charges of treaty crimes. The judge also determines which if any of such charges of treaty crimes are sufficiently sustained by the evidence to satisfy the probable cause standard of our domestic criminal law. If his decision is in favor of the demanding government he commits the accused to jail, certifying his finding, together with the evidence he has received, to the Secretary of State.

Then, as provided by 18 U.S.C. § 3186, "the Secretary of State may order" that the person so committed be surrendered to the demanding nation "to be tried for the offense of which charged. . . ." If the Secretary of State does not act within two months, the fugitive may be discharged unless sufficient cause is shown why he should not be. 18 U.S.C. § 3188. And our extradition treaties provide that the demanding nation may try the accused only on the charges for which he is surrendered. *E.g.*, United States-Venezuela Treaty, Art. XIV, 43 Stat. 1706.

As to the charges that are not within the treaty or not sustained by the evidence, the accused is freed by the judge. On those charges the Executive cannot even consider his surrender; the accused is immune from the exercise of the Executive power. See 6 Ops. Att'y Gen. 91, 94 (1853). The judge's determination as to them is conclusive upon the demanding nation and the United States alike.[20]

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[20] The demanding nation can present another complaint to the judge. Res judicata does not apply strictly, just as it does not apply in connection with a preliminary commitment proceeding in the domestic criminal process. But something closely akin to res judicata will be applied in extradition to prevent repeated complaints without good reason. Collins v. Loisel, 262 U.S. 426, 429-30 (1920); see also 6 Ops. Att'y Gen. 91, 97-98 (1853).

So, in the present case, the murder charges have been dismissed, and the petitioner thereby has secured immunity from surrender or, if he is surrendered on the other charges, immunity from trial in Venezuela on the murder charges.

An extradition judge's finding against the demanding government, therefore, is anything but "advisory." The judge's decision is final—more conclusive than would be the decision of the same judge sitting in a domestic preliminary hearing that the evidence was insufficient to justify holding the defendant. For nothing in the Constitution or statute precludes the United States Attorney from ignoring such a decision by a committing magistrate and seeking and obtaining an indictment of the same defendant and putting him to trial.

As to those charges that are found to be within the treaty and sufficiently sustained by the evidence, the judge binds the accused over for action by the Executive—exactly as, in domestic criminal process, he binds over for further action. This binding over takes the form of a commitment, an incarceration; it is both a determination that the Executive is *empowered* to act in the premises according to the precepts of treaty and statute—a determination of a strictly legal question—and an actual physical restraint.

The Secretary of State of course is not bound to surrender the fugitive. It would be inconsistent with our concept that foreign relations are conducted by the Executive, and probably unconstitutional, for Congress to leave the Secretary without discretion once the judge has committed the fugitive or to provide that the judiciary itself may order surrender.

But this no more means that the judge's determination of extraditability and commitment for such action as the Secretary of State may find proper is merely "advisory" than that the determination upon a domestic preliminary hearing that there is probable cause to believe the defendant guilty of a crime is merely "advisory" because the prosecutor may choose not to press charges or to seek an indict-

ment for some other crime, or the grand jury may choose not to indict. Theoretically either the prosecutor or the grand jury may believe that the committing judge was in error. But that does not make the judge's commitment a mere empty "advisory."

Petitioner founds his argument that the judge's action is purely "advisory" on *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). (Pet., pp. 30-31). But reliance on that case for the proposition petitioner asserts discloses the fault in his analysis. There this Court's majority held that judicial review of a recommendation by the Civil Aeronautics Board as to how the President should dispose of an application for a license to operate an airline route would amount to a mere advisory opinion since, upon transmittal of the judicially reviewed recommendation to the President, he would be quite free to do as he pleased. But the action of the extradition judge is just as different from *Waterman* as was the judicial action considered in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950). In the *Kristensen* case the question was whether the courts could review an order of the Attorney General refusing temporary postponement of deportation. A statute provided that, for certain reasons, the Attorney General could postpone a deportation, reporting his action to Congress, but that postponement could be effective only for a limited time unless Congress affirmatively determined that the alien should not be deported. It was suggested, on the basis of *Waterman*, that court review of the Attorney General's action would transgress Article III because, even were he to postpone in light of court review, it would be Congress—not the courts—who would determine the alien's fate. Congress, of course, could act on any basis it pleased—that the court was in error or any other basis. This Court quickly saw the great difference from *Waterman*. In *Waterman* the court's action would affect no one; only the President's action would be consequential. But in *Kristensen* the court's action would have effects—even if only for a limited period. 340 U.S. at 167-68.

So here, the extradition judge's action, as we have seen, has very crucial effects. A decision for the fugitive frees him. A decision against the fugitive jails him for a substantial period. That the Secretary of State might ultimately refuse to surrender him no more dissipates the effect of the extradition judge's commitment than would Congressional refusal to waive deportation dissipate the effect of the temporary postponement of deportation in the *Kristensen* case. Indeed in this very case, this petitioner, anxiously seeking release from jail since the Court of Appeals' decision, would be the last to assert that the judge's commitment has had no consequences.

D. *THE LACK OF MERIT IN PETITIONER'S ATTEMPTED DISTINCTION OF THE COMMITMENT POWER.*

Petitioner says that the analogy of the extradition judicial proceeding to the domestic preliminary hearing does not answer the question he poses, and he supports this by wrenching out of its context a statement by this Court so as to make it seem to say that the conduct of a preliminary hearing by a judge is permissible because the court has the final decision of the entire criminal case. (Pet., p. 35). This attempted distinction is wholly without merit for two reasons. First, the opinion from which he quotes, read in full context, does not at all distinguish extradition from the preliminary hearing but assimilates the two proceedings. Second, this Court has sustained the exercise of the commitment power, in circumstances strikingly like those of extradition, where there was to be no further judicial proceeding as to which the court had the final decision.

1. The case from which petitioner quotes an isolated phrase is *Collins* v. *Miller*, 252 U.S. 364 (1920). This was a unanimous decision with an opinion by Mr. Justice Brandeis.

A district judge had committed a fugitive in extradition on three charges. On habeas corpus a brother district judge had held that on one of the charges the commitment was proper but that on the other two charges the fugitive

had been wrongfully denied the right to introduce certain evidence. He remanded the case to the extradition judge on those charges, purporting to grant the writ as to them but ordering detention to continue pending the outcome of the remanded proceedings. On appeal this Court dismissed on the ground that there was not a final judgment since there had been a single petition for habeas corpus that, in view of the remand, had not been finally disposed of. The reasoning of this Court's opinion led it to inquire into the nature of the relationship between the two judges—the habeas corpus judge and the extradition judge, termed in the opinion, "the extradition commissioner." 252 U.S. at 369.

Most significantly the opinion reasons that the order of remand by the habeas corpus judge

> "resembles . . . that which might be entered by a district judge after having reviewed the proceedings taking place before a United States commissioner, under the court's authority to assume control in the preliminary stages of matters of which it has the final decision under the law." *Ibid.*

At that point the opinion cites a series of cases dealing with various aspects of the relationship between a commissioner and his court, including the relationship existing where a commissioner conducts a preliminary commitment proceeding in a domestic criminal case. The point made in the opinion, of course, is that the extradition judge's own court, acting in habeas corpus, can and does exercise a measure of supervision over the extradition judge (or commissioner) just as it does in the supervision of the preliminary commitment procedure in domestic cases.

On this reasoning, if there were any slight substance to the question that petitioner poses—*i.e.*, that a judge of an Article III court is forbidden to act in extradition at all because his court is forbidden to do so—Mr. Justice Brandeis could not possibly have avoided noticing and

dealing with the question.[21] For he was holding that the lack of finality came about because the habeas corpus court was retaining control over the extradition proceeding itself, just as a court controls a domestic preliminary commitment proceeding conducted by one of its commissioners. Indeed, the Justice went so far as to suggest the possibility that the habeas corpus court might have conducted the extradition hearing *de novo*, taking the excluded evidence, and have itself determined "whether the prisoner should be discharged:" although, since the habeas corpus judge had not undertaken to do so, the opinion states that it was unnecessary to consider whether that could have been done. *Id.* at 370. *Cf. Grin* v. *Shine*, 187 U.S. 181, 187-88 (1902).

2. The magisterial power of commitment, exercised by judges of Article III courts historically and today, is by no means limited to cases in which a person is bound over for further judicial action.

The case of *Dallemagne* v. *Moisan*, 197 U.S. 169 (1905), is especially instructive on this point. There this Court went out of its way to hold that an Article III court could exercise a commitment power very like the extradition commitment power conferred upon judges of such courts by 18 U.S.C. § 3184. That case involved Rev. Stat. §§ 4079-81, enacted to effectuate treaties giving foreign consuls jurisdiction over controversies among alien seamen aboard foreign vessels. A foreign consul was authorized to apply "to any court of record of the United States" or to a judge or commissioner to arrest a seaman. Upon the arrest the court or judicial officer could hold a hearing and if the requisite showing was made—which was comparable to the probable cause showing that must be made in extradition—could commit the seaman for not more than two months, within which time the consul would have to

[21] That Mr. Justice Brandeis was not unaware of the very materials from which the petitioner principally constructs his Article III question (Pet., pp. 29-30) is shown by his citation, 252 U.S. at 369, of United States v. Ferreira, 54 U.S. (13 How.) 40 (1851), and 6 Ops. Att'y Gen. 91 (1853).

arrange to return him to his country or he would be released.

In the *Dallemagne* case an arrest was made on a consul's application, but not by a court or judicial officer as authorized in the statute. On the consul's appeal from a district court judgment discharging the seaman on habeas corpus this Court reversed, holding that, though the arrest had been illegal, when the seaman was brought into the district court on the writ that court could proceed with the examination and commitment of the seaman, since the court itself was one of the agencies authorized by the statute to hold a hearing and commit to the consul. *Id.* at 174-76. It would require a highly technical distinction to differentiate in constitutional terms commitment by an Article III court for two months to await the action of a foreign consul and commitment by a judge of the same court for at least two months to await the action of the Secretary of State.

E. *THE DOUBTFULNESS OF PETITIONER'S CONTENTION THAT AN ARTICLE III COURT COULD NOT CONDUCT THE EXTRADITION JUDICIAL PROCESS, AND THE LACK OF NEED TO REACH THE QUESTION.*

Though the petitioner asserts it as hornbook law that an Article III court could not act in extradition he is quite wrong. Section 3184 itself could readily be so rephrased that there would be no doubt that an Article III court could exercise the power.

It would plainly be constitutional for Congress to provide for initiation by the Executive of action to extradite a fugitive upon the request of a foreign government, with the fugitive entitled to petition in an Article III court for a decree that he was immune from extradition unless in such statutory proceeding the demanding government submitted evidence giving the court probable cause to believe him guilty of a treaty crime. The fact that if the court denied relief to the fugitive the Secretary of State would not be required to surrender him would raise no Article III question. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939).

The foregoing is precisely the effect—different only immaterially in form and in wording—of 18 U.S.C. §§ 3184 and 3186. Surely a constitutional question that can be obviated by merely reversing the positions of the parties and changing the form but not the substance of the judgment that is entered is not so substantial as to require the attention of this Court.[22]

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[22] Petitioner states at one point that this Court has already decided that the extradition proceeding as now provided for is not within Article III. He says that this Court "has made plain the non-Article III nature and hence the non-reviewability of the determinations of an individual judge or commissioner in the extradition-type proceeding." (Pet., pp. 31-32). He cites five cases. Not one is even close to his text. Extradition decisions of federal judges and commissioners are not reviewable by way of appeal because Congress has not provided for an appeal; it would not be the way of this Court to premise a decision on a constitutional point when a clear statutory premise was available, and of course it has not done so. Indeed, we know of only one case in which it has been sought to take an appeal from a decision of an extradition judge, and in that one the Court of Appeals dismissed the appeal on the statutory ground with no discussion whatever of Article III. Jimenez v. Aristeguieta, 290 F.2d 106 (5th Cir. 1961). No petition for certiorari was filed.

The cases that petitioner cites for the proposition he asserts do not support it either in holding or in dicta. Two of them, indeed, establish the propriety of the judicial proceeding in extradition, as we have seen (*supra*, pp. 21-26): In re Kaine, 55 U.S. (14 How.) 103 (1852); In re Metzger, 46 U.S. (5 How.) 176 (1847). A third, In re Oteiza y Cortes, 136 U.S. 330 (1890), is, like *Kaine*, a case in which review was had of an extradition decision by way of habeas corpus and says nothing of Article III. Todd v. United States, 158 U.S. 278 (1895), holds that, in the tradition of strict construction of criminal statutes, a statute punishing intimidation of witnesses before a court will not be construed to punish intimidation of witnesses before a commissioner. A final case, United States v. Ferreira, 54 U.S. (13 How.) 40 (1851), does deal with Article III, but it does not deal with an "extradition-type proceeding" but rather with the processing by a judge of a claim presented and determined *ex parte*—a matter in which there were no suit, no parties, no judgment. *Id.* at 46-47.

But it is quite unnecessary for this Court to be drawn into a mulling of what Article III courts might be authorized to do. For even if some day it were to be held that Article III *implies* limitations upon permissible activities of judges of Article III courts—the Article does not speak of judges but only of courts[23]—it is quite inconceivable that such limitations would preclude activities as closely related to the courts' constitutional powers and functions as is the historic role of determining whether to commit an accused.

For if it is in mere inferences from Article III that limitations, if any, upon judges are to be found certainly those inferences must be based on the policy of Article III to assure the independence of the judicial department. Magisterial powers of arrest and commitment in preliminary hearings and in removal proceedings, of administering oaths and taking acknowledgments, of issuing warrants, and so on—powers shared in many cases by judges of Article III courts with non-Article III officers such as commissioners, *cf. Robertson* v. *Baldwin*, 165 U.S. 275, 279

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[23] Article III of course does not explicitly limit the judges, as the petitioner acknowledges. (Pet., p. 33). Nor has this Court ever held that it implies a limitation on the judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40 (1851). Quite to the contrary, the limitation in Article III of this Court's original jurisdiction never applied to bar a Justice from sitting in lower courts and exercising a different original jurisdiction. *Cf.* also United States v. Clark, 25 Fed. Cas. 441, 442 (No. 14,804) (C.C.D. Mass. 1813), where Mr. Justice Story pointed out that a judge of a district court can act variously otherwise than within the confines allowed to his court—for example, he can act as a member of the circuit court or as a committing magistrate respecting crimes not cognizable by the district court.

(1897)[24]—have never been thought to threaten that independence. No more does the commitment proceeding in extradition, whose independence of the Executive has been secure since 1799 and was confirmed by Congress in 1848.

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[24] Commitment in criminal cases: 18 U.S.C. § 3041, derived from Judiciary Act of 1789, § 33, 1 Stat. 91.

Removal: Fed. R. Crim. P. 40, derived from Rev. Stat. § 1014.

Holding to security of the peace and for good behavior: 18 U.S.C. §3043, derived from Act of July 16, 1798, 1 Stat. 609.

Issuance of search warrants: Fed. R. Crim. P. 41, derived from various sources.

Commitment to foreign consuls of alien seamen involved in disputes affecting discipline of foreign ship: 22 U.S.C. §§ 256-58, derived from Act of June 11, 1864, 13 Stat. 121.

Commitment of deserting alien seamen: Rev. Stat. § 5280, derived from Act of March 2, 1829, 4 Stat. 359.

Issuance of warrant for detention of ship shown probably to be intent on engaging in foreign military expedition; ship detained might be released on order of President: Act of March 10, 1838, § 3, 5 Stat. 213.

Administration of oaths and affirmations and taking of acknowledgments: 28 U.S.C. § 459, derived from various sources.

Issuance of warrants and taking of testimony relating to House of Representatives election contests, testimony to be delivered to the Clerk of the House: 2 U.S.C. §§ 206-23, derived from Act of January 23, 1798, 1 Stat. 537.

Note also—

Making inquiry into whether revenue law penalty should be remitted; findings forwarded to Secretary of the Treasury, who made final decision: Rev. Stat. § 5292; see Mactavish v. Miles, 263 Fed. 457 (D. Md. 1920); The Palo Alto, 18 Fed. Cas. 1062 (No. 10,700) (D. Me. 1847).

Making inquiry into whether penalty incurred for importing goods from Great Britain and Ireland during War of 1812 should be remitted; findings forwarded to Secretary of the Treasury, who made final decision: Act of February 27, 1813, 2 Stat. 804; see The Margaretta, 16 Fed. Cas. 749 (No. 9,072) (C.C.D. Mass. 1815).

F. THE PETITIONER'S OTHER CONTENTIONS RELATING TO ARTICLE III.

1. Petitioner asserts that, for the purpose of Article III, a distinction between judges and courts cannot realistically be drawn and that, in any event, it was obscured in this proceeding. (Pet., pp. 36-41).

The fact is, however, that the distinction is taken in many statutes. The commitment statutes to which we have referred, naming sometimes both courts and judges and sometimes only judges, are one example. (*Supra*, p. 37 n. 24). For another, the habeas corpus statute does not empower the courts of appeals to issue the writ but does confer that power upon circuit judges, and the distinction is carefully maintained. 28 U.S.C. § 2241(a); see *Chapman* v. *Teets*, 241 F.2d 186 (9th Cir. 1957); *Walshfer* v. *Jacques*, 198 F.2d 711 (6th Cir. 1952). Again, in *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 50 (1851), the Court said of *Hayburn's Case* that "there seems to have been no doubt at that time" that if the statute there involved could be fairly construed as giving power to individual judges "they might constitutionally exercise" it even though as courts they could not. *Cf. Todd* v. *United States*, 158 U.S. 278, 284 (1895); *United States* v. *Clark*, 25 Fed. Cas. 441, 442 (No. 14,804) (C.C.D. Mass. 1813) (Story, J.). Thus there is no basis for saying that generally there can be no distinction between a judge and the court on which he sits. (It is not this Court that administers the oath of office to the President.)

As to the alleged obscuring of the distinction between court and judge in the extradition proceeding in this case, the reasons given by the petitioner for his contention are attributable to the habits of counsel, judges and clerks of court in matters purely of form or are related to the administration and oversight of court personnel and have nothing to do with Article III or with petitioner's argument.

The facts that pleadings were given a district court caption and the case a district court docket number, that prayers were sometimes addressed in form to the court and that proceedings were held in a regular courtroom are

plainly of no consequence. See *Collins* v. *Miller*, 252 U.S. 364, 367 (1920). (By statute, the proceeding must be conducted on land in a public place. 18 U.S.C. § 3189.) In one of his attempts to secure release on bail, in December 1962, petitioner addressed a petition for habeas corpus to a circuit judge, and the hearing was held in a courtroom and both his petition and the order denying it bore court of appeals captions.

Nor is it at all relevant that four district judges acted in the extradition case.[25] Each of them had statutory authority to act, there was no objection by petitioner or any other party and none of the judges regarded himself as acting otherwise than pursuant to the statute. *Cf. Grin* v. *Shine*, 187 U.S. 181, 187-88 (1902). Furthermore, there is no doubt that Judge Mathes had authority to act as a judge in extradition in Florida by virtue of his assignment to the Southern District of Florida by the Chief Justice, 28 U.S.C. § 296, and when he was relieved of further responsibility in cases in the Southern District of Florida, by his own action confirmed by the Judicial Council of the Fifth Circuit (Tr. 2793-98; *supra*, p. 9), and no longer sat in that district, he probably lost his power to act in the extradition case. *Cf. Frad* v. *Kelly*, 302 U.S. 312 (1937). That this may have been an effect of the Judicial Council's order entered in the fulfillment of its duty to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," 28 U.S.C. § 332, certainly does not mean as petitioner says (Pet., pp. 39-40) that Judge Mathes must have been acting as a court in this case. Even if the order of the Judicial Council was intended, as it apparently was, to include the extradition case (Tr. 2902), the case, being heard by one of the judges of the district court, certainly affected "the business of the courts" so as to place it within the administrative competence of the Judicial Council. (And see Pet. App., p. 9a).

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[25] See *supra*, p. 5, n.3, for the very minor extent of the participation of two of these judges, and that only at a very preliminary stage of the proceeding.

2. Petitioner urges that the pendency here of Nos. 1 and 4 of this Term, the subpoena cases growing out of this extradition proceeding, is a reason for granting certiorari in this case. He goes so far as to say that briefing and argument of those cases were postponed by this Court "to await the filing and consideration of the instant petition." (Pet., p. 42).

The statement by the petitioner is, of course, quite erroneous. The postponement of Nos. 1 and 4 occurred at the beginning of the 1961 term because the extradition of the petitioner would moot those cases, but with habeas corpus then pending ultimate extradition was not certain. Consideration "of the instant petition" was not even contemplated.[26]

In any event the pendency of Nos. 1 and 4 is no reason to grant certiorari in the present case. The cases are related, as now framed, only in that they arise from the same extradition proceeding; the issues posed are quite distinct.[27]

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[26] It is equally erroneous to say that this respondent sought postponement of action in Nos. 1 and 4 because "the premise of the jurisdictional problem here at issue" is similar to one of the arguments advanced in Nos. 1 and 4. (Pet., p. 42). The error of that statement is obvious since "the jurisdictional problem here at issue" had not even been hinted at or thought of by anyone (least of all this petitioner) at the time of the postponement of Nos. 1 and 4. The argument being made by the petitioner in the habeas corpus case to which the present respondent referred in suggesting postponement of Nos. 1 and 4 was that Judge Mathes' jurisdiction in the extradition case was never terminated because he had jurisdiction as a "judge" and not as a "court," that therefore he remained seized of the complaint filed with him, and that all that followed his ceasing to act in the case was void because only he could act on that complaint. This argument was disposed of by the court below so convincingly that the petitioner has abandoned it. (Pet. App., pp. 6a-10a). Now, indeed, he reverses his field and argues that Judge Mathes lost jurisdiction by expiration of his assignment. (*Infra*, pp. 54-57).

[27] Petitioner also adverts to Nos. 1 and 4 in suggesting that somehow the distinction between the judge conducting the extradition proceeding and the court on which he sat was lost sight of. But if

The question presented in Nos. 1 and 4 is whether there is power to compel the production of evidence at the request of a demanding government in an extradition case or, stated abstractly, the scope of the powers of a tribunal conducting a particular proceeding. But in the present case the question petitioner seeks to present is whether the tribunal had jurisdiction to conduct the proceeding at all. The question is made neither less nor more substantial by the existence of outstanding questions respecting the scope of the tribunal's powers but assuming its basic jurisdiction. No one appearing in Nos. 1 and 4 has ever hinted that a judge altogether lacks jurisdiction of the extradition proceeding.

An analogy is this: Congress creates a new administrative agency. The question comes to this Court whether that agency has some power enjoyed by other agencies. The question is of general importance and, it may be further assumed, is a nice question under the statute creating the agency. At the same time a frivolous challenge is made to Congress' power to create the agency at all. It could not be seriously contended that it would not be wholly appropriate for this Court to hear the case posing the first question and at the same time refuse to hear the challenge to the agency's basic authority. *Cf. Hannah* v. *Larche*, 363 U.S. 420, 452 (1960).

If certiorari is denied in this case, Nos. 1 and 4 will be moot or imminently so because there will be no occasion for the exercise of the power to compel production of evidence in extradition for which this respondent contends in both cases. If certiorari were to be granted in this case, there probably would be no occasion to hear Nos. 1 and 4 for, if the petitioner were sustained in his Article III argu-

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one thing is clear, it is that the litigation over subpoenas, here as Nos. 1 and 4, was regarded by all concerned as involving separate and distinct district court proceedings. *Compare* Jimenez v. Aristeguieta, 290 F.2d 106 (5th Cir. 1961), *with* Aristeguieta v. Jimenez, 274 F.2d 206 (5th Cir. 1960), and First Nat'l City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960).

ment, the questions in Nos. 1 and 4 would likely be deemed foreclosed, while if the judgment below was affirmed the cases would be moot in the same way as upon the denial of certiorari. In short, nothing in Nos. 1 and 4 warrants this Court's devoting its time to this case.

G. *PETITIONER'S LACK OF STANDING TO RAISE THE QUESTION HE SEEKS TO PRESENT.*

Petitioner has no standing to raise the constitutional question he seeks to present. His bizarre complaint is that his case was heard by a judge having the constitutional assurances of tenure and no diminution of compensation.

This, therefore, is not a case where a litigant claims that his right to an Article III decision has been impaired because a judicial officer allegedly without Article III status heard his case, the question heard last term in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). This is a case where the petitioner, on his own view of the case, received the benefit of *more* than his constitutional due, the attention of an Article III judge. How he can show that a constitutional right has been denied him to his injury is impossible to fathom.[28]

But the doubt as to petitioner's standing is even more fundamental. He does not, and cannot, argue that an Article III judge goes beyond permissible bounds in finally determining that he is immune from surrender on the murder charges that at one time confronted him. His argument is that an Article III judge goes beyond permissible bounds because the Executive can still decide in his favor not to surrender him after the judge has decided the case against him on the charges of financial crimes. We submit that the petitioner cannot complain because there remains to him such a possibility of executive indulgence.

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[28] Nor is this case like National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), where a defendant claimed the right to be sued in the state court of a state in which he did business and where, in any event, the federal Article III court was bound to notice a question of its own jurisdiction.

And beyond technical questions of standing, the petitioner acquiesced throughout in the hearing of his case by the judges of Article III courts. When the question was first raised by the court itself on oral argument in the court below (petitioner had not so much as hinted at it in his petition for habeas corpus or his appeal papers) petitioner declined to urge that a judge of an Article III court had no jurisdiction in extradition. His declination became the more pointed when he failed to ask for a rehearing in the Court of Appeals after that court had decided the question.

II. *SUMMARY AND CONCLUSION.*

Petitioner seeks to bring before this Court a question that every judge, court and extradition lawyer has regarded as settled since the decisions in *Metzger's* and *Kaine's* cases more than a century ago. In that time judges of Article III courts have heard many extradition cases, and in some of these, in the extradition proceeding itself or on habeas corpus, the Article III question would have come to the fore as it certainly would in *Collins* v. *Miller*, 252 U.S. 364 (1920) (*supra*, pp. 31-33), had there been any doubt about its proper resolution.[29]

There is, then, no uncertainty in the law that calls for the attention of this Court. The court below displayed no uncertainty. Having raised on its own motion the question now adopted by petitioner, it disposed of it without ado. (Pet. App., pp. 9a-10a).

There is, moreover, no substance to petitioner's question even if it is regarded academically and unrealistically as a novel one. The alternative to the judge acting in

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[29] Collins' case was heard here three times. See, in addition to *Collins* v. *Miller*, Collins v. Loisel, 259 U.S. 309 (1922), and Collins v. Loisel, 262 U.S. 426 (1923). Each time the action of a United States District Judge sitting in extradition was considered and each time the case was disposed of in a unanimous opinion written by Mr. Justice Brandeis, whose citations show that he was fully aware of the concepts that underlie petitioner's belated argument here. See 252 U.S. at 369; 262 U.S. at 429 n.1.

extradition would in all likelihood be an official of some agency such as the Immigration and Naturalization Service. For state judges have rarely been called upon to act in extradition, and there would be many practical problems were they asked to do so often. United States commissioners have frequently performed the extradition function but always under the supervision of the courts that appoint them. *Grin* v. *Shine*, 187 U.S. 181, 187-88 (1902); *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930). If the judges of those courts and, *a fortiori*, those courts themselves were barred from acting in extradition, the commissioners would no longer have the benefit of that supervision and thus would be less than satisfactory substitutes for the judges.

It would be ironical for this country in this way to prevent the members of its independent judiciary—whose participation in extradition free from executive control was secured in the aftermath of *Robbins'* case in 1799—from acting to assure that the rights of individuals will be protected. Other nations regard extradition as of sufficient gravity to the individual to warrant jurisdiction in their high courts and judges.[30] It is inconceivable that our Constitution would require this nation alone to cheapen the interest of an accused.

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[30] A selection of national extradition statutes as of 1935 is included in Harvard Research in International Law, Extradition, App. VI, 29 Am. J. Int'l L. Supp. 356 (1935). For provisions as to participation of courts and judges, see *id.* at 358, 360-61 (Argentina), 367-68 (Brazil), 370-72 (Canada), 378 (Chile), 387 (Germany), 406-07 (Greece), 409 (Italy), 417 (Sweden), 425 (Switzerland).

II. Embezzlement and other financial crimes committed for the private enrichment of the petitioner obviously are not within Article III of the Treaty excluding political offenses from extradition.

Article III of the United States-Venezuela Extradition Treaty, in common with similar provisions of this country's other extradition treaties and of the special extradition statute, 18 U.S.C. § 3185, *supra*, p. 27 n.19, excludes political offenses. Specifically, it provides:

> "The provisions of this Convention shall not import claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses. . . ."

In his certification to the Secretary of State Chief Judge Whitehurst found that each of the financial crimes—embezzlement, criminal malversation, etc.—as to which probable cause was established "was for the private financial benefit of the defendant and is not a crime or offense of a political character or an act or acts connected therewith." (Pet. App., p. 38a). The Court of Appeals held that the "decision that the financial crimes were not political was based upon the evidence and is not reviewable here," citing this Court's opinion in *Ornelas* v. *Ruiz*, 161 U.S. 502, 509 (1896).

The evidence, indeed, was overwhelming. The acts charged were shown to have been committed with elaborate secrecy, through "fronts," "bagmen" and other covers, and with the money petitioner obtained through such acts either kept in cash in his personal safes or sent, mainly through messengers, far away to his personal accounts in banks in New York and Switzerland—never to banks in Venezuela. The evidence was clear that all this was done by the petitioner to enrich himself personally.

Chief Judge Whitehurst's determination was clearly correct and the court below applied the proper standard of review. There is no occasion for further review by this Court.

In the court below petitioner urged that the financial crimes for which he had been committed were acts "connected with" political offenses because they were joined in a complaint or "claim" that also included the murders with which he was originally charged and which he urged were political killings.[31] This obvious wordplay, which received the treatment it deserved from the Court of Appeals (Pet. App., pp. 17a, 18a-19a), is not repeated in this Court. Rather, petitioner now urges that abuses of office when committed by a head of government, though they consist of the gross acts of corruption and illicit personal enrichment shown here, are necessarily "in themselves political offenses" under Article III of the Treaty. (Pet., p. 51). It was under another guise that he argued something of this sort below.[32]

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[31] Chief Judge Whitehurst, on finding the evidence insufficient to connect the petitioner with the murders (Pet. App., p. 36a), deemed it unnecessary for that reason to determine whether the murders were of a political character and said a finding that they were would not affect the wholly separate financial crimes. (Pet. App., p. 38a). The Court of Appeals pointed out further that, since petitioner had been found not to be connected with the murders, they were certainly not political crimes attributable to him and whether they were political crimes by those who committed them could have no bearing on his case. (Pet. App., pp. 17a-18a).

[32] Petitioner contended below that as a former head of government he was immune from a judicial finding of extraditability because of the Act of State doctrine. The Court of Appeals readily disposed of this contention, stating that "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it . . . are as far from being an act of state

There is not a line in a judicial opinion, in an executive decision, or in the writings of scholars in the field that lends the slightest support to this argument.' There is no question that a lower government official who, in abuse of his office, stole hundreds or thousands could be extradited; it has been done repeatedly. *Fernandez* v. *Phillips*, 268 U.S. 311 (1925); *Neely* v. *Henkel*, 180 U.S. 109 (1901); *In re Oteiza y Cortes*, 136 U.S. 330 (1890). But, on petitioner's view, the official's ultimate superior who took millions could remain in this country living in the luxury his thefts made possible. Petitioner's suggestion is, quite baldly, that what would otherwise not be a political offense becomes so only because the accused held highest rank.[33]

It is true, as petitioner says, that this Court has never formulated a detailed definition of political offense. But the boundaries of the concept have been marked out with reasonable clarity, and petitioner's financial misdeeds are nowhere near them.

The core of the concept is what scholars have termed the

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as rape which . . . [petitioner] committed would not be an 'Act of State.'" (Pet. App., p. 15a). Because of its demonstrated lack of merit (see the full discussion by the court below, Pet. App., pp. 14a-17a), the petition reduces the Act of State argument merely to a "pertinent" consideration under Article III of the Treaty and does not present it as a question for review here. Pet., pp. 50-51).

[33] It will be observed that the petitioner does not suggest that an offense is political and so immune from extradition because committed by abuse of a government official's power. The cases cited in the text foreclose such a contention. And the Treaty with Venezuela, like other treaties, explicitly contemplates that abuse of office in itself is not immunizing; it covers "embezzlement or criminal malversation . . . *by public officers*, . . ." Art. II, clause 14. *Cf.* the same category of extraditable crimes included in 18 U.S.C., § 3185, *supra*, p. 27, which likewise prohibits extradition for political offenses.

"purely political offense"—treason, subversion and the like."[34]

In order, however, to give full scope to the purpose for which the exemption of political offenses from extradition was developed during the nineteenth century—to prevent "the surrender of fugitives who had been engaged in unsuccessful democratic revolutions against monarchical governments"[35]—the concept must go beyond these core offenses to include what would otherwise be common crimes committed under such circumstances as to make them political in purpose. These are mixed or relative political offenses.[36]

This type of crime has produced the litigation in American law that has shaped the concept of political offense or acts connected therewith. Ordinarily the cases have involved murders or other crimes of violence such as robbery or arson committed by persons claiming to be

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[34] It may be that petitioner's theft of the 1952 election, a crime originally charged to him in Venezuela, would be considered a purely political offense. Petitioner asserts that this charge is still pending against him in Venezuela. (Pet., p. 49). Since it was not included in the warrant for petitioner's arrest issued by the Venezuelan Supreme Court of Justice (Tr. 1132-49), this is doubtful. In any event, Article XIV of the Treaty provides that "no person shall be tried for any crime or offense other than that for which he was surrendered," and there is no claim that Venezuela does not intend to adhere to this solemn commitment. Nor could there be here. Kelly v. Griffin, 241 U.S. 6, 15 (1916); Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

[35] Jacob, International Extradition: Implications of the Eisler Case, 59 Yale L.J. 622, 630 n.30 (1950).

[36] For discussion of pure and mixed political offenses, see Harvard Research in International Law, Extradition, 29 Am. J. Int'l L. Supp. 113 (1935); Deere, Political Offenses in the Law and Practice of Extradition, 27 Am. J. Int'l L. 247, 248 (1933); García-Mora, The Nature of Political Offenses, 48 Va. L. Rev. 1226, 1231-39 (1962).

revolutionaries,[37] or by persons in power taking the field against their adversaries or otherwise combatting violence with violence,[38] or engaging in mopping up after a violent struggle.[39]

Writing in 1945, Professor Hyde said the common elements of the American cases decided up to that time in which the political offense immunity had been recognized were:

> "(1) There has been an uprising of revolutionary origin and purpose against the demanding government. . . .
>
> "(2) The accused has been connected with the movement. . . .
>
> "(3) Either the acts charged against the accused have been deemed incidental to the movement, or the evidence has failed to show that acts committed in the course of the uprising which might possibly not be justly regarded as incidental thereto, were in fact committed by the accused." 2 Hyde, *International Law* 1021-22 (2d rev. ed. 1945).

The cases decided subsequently have not impaired Professor Hyde's summary.

When the court below said, "There is no evidence that the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other

[37] See Ornelas v. Ruiz, 161 U.S. 502 (1896) (political offense immunity disallowed); Case of William Lyon McKenzie, 1 Moore, Extradition § 211 (1891); Case of Francisco J. Cazo, *id.* § 217; Case of Christian Rudewitz, 4 Hackworth, Digest of International Law 49-50 (1942), and 2 Hyde, International Law 1021-23 (2d rev. ed. 1945); Case of Jan Janoff Pouren, [1909] Foreign R. 1, U.S. 513-23 (1914); Case of James Lynchehoun, 2 Hyde, *op. cit. supra* at 1021.

[38] See United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383, 392-93 (S.D. Cal. 1959), *on remand from* Karadzole v. Artukovic, 355 U.S. 393 (1958), *vacating* 247 F. 2d 198 (9th Cir. 1957); In re Ezeta, 62 Fed. 972 (N.D. Cal. 1894).

[39] Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959).

violent disturbance" (Pet. App., p. 89a), it was merely pointing out that there was no suggestion that the crimes here grew out of or were connected with the disturbances in Venezuela during the petitioner's years in office on which the petitioner had dwelt at length in some of his arguments about the political character of the killings. But the court was not saying that there could never be a case of political offense apart from one involving disturbances of that nature.

Whether there might be a political offense that is not within Professor Hyde's summary may some day receive the consideration of this Court. One can imagine such a case—for example, unlawful diversion of funds from one governmental purpose to another governmental purpose, unrelated to a political disturbance, *cf. In re Mylonas*, 187 F. Supp. 716, 720 (N.D. Ala. 1960)—but this case is certainly not the appropriate vehicle to explore the question. As a matter of fact there is a growing concern in international juristic circles as to whether the political offense immunity as defined in the past here and elsewhere is too broad—a concern that may be shared by this Court in view of its refusal to agree with two courts below that charges of mass murder against a top official of the World War II Nazi puppet government of Croatia were political on their face. *Karadzole* v. *Artukovic*, 355 U.S. 393 (1958). But that as it may, for the expansion of the political offense immunity to be considered in this case—where the plea is that immunity is attached to the petitioner's rank rather than to the offense—would be singularly awkward and unrewarding. For surely the plea is frivolous. Not even in the *Artukovic* case did the lower courts intimate that they thought there was necessarily a political offense because of the rank of the accused; indeed the magistrate who heard the case repudiated the suggestion. *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383, 392 (S.D. Cal. 1959).

The petitioner makes an alternative suggestion—that his

crimes fall within the political offense immunity because they are "connected with the manifold political crimes and charges leveled by petitioner's political opposition." (Pet., p. 51).

We confess that we find the suggestion thus put difficult to understand. The two sentences that immediately follow this suggestion may reveal what is meant: the petitioner says, "The underlying mosaic reveals the fundamentally political nature of the extradition *claims*. They are but the aftermath of a violent upheaval." (*Ibid.*) (Emphasis added.)

These two sentences, read against the petitioner's statements in his preceding discussion concerning President Betancourt's alleged enmity toward this petitioner and rather vague references to Venezuelan history and to "the political coloration of the effort to extradite," may mean that the petitioner is suggesting that the political offense immunity bars a demand or claim for extradition that is inspired by political antagonism or evil design.

If this is petitioner's meaning he seems to be trying to accomplish obliquely a reconsideration by this Court of one of the most firmly established tenets of extradition: that the judiciary is not authorized to inquire into the possible political or ulterior motivation of the demanding government in seeking extraditions; any such questions are reserved for the consideration of the Executive in deciding whether to surrender the fugitive or in determining what guarantees to require from the demanding government. See, *e.g.*, *Lincoln* v. *Power*, 241 U.S. 651 (1916), *affirming In re Lincoln*, 228 Fed. 70, 73-74 (E.D.N.Y. 1915); *Ramos* v. *Diaz*, 179 F. Supp. 459, 463 (S.D. Fla. 1959); *In re Ezeta*, 62 Fed. 972, 986 (N.D. Cal. 1894); see also *Kelly* v. *Griffin*, 241 U.S. 6, 15 (1916); *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911); *Gallina* v. *Fraser*, 278 F.2d 77, 78-79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960); *Laubenheimer* v. *Factor*, 61 F.2d 626, 628 (7th Cir. 1932), *aff'd*, 290 U.S. 276 (1933).

In fact the petition does not present, as one of its questions, a proposed reconsideration of this firm doctrine.

In any event Article III of the Treaty deals with the nature of the crimes for which extradition is sought; by no twist either of language or of doctrine can the alleged antagonism of officials of the demanding government be pertinent to the character of the crimes when they were committed. And we invite attention, further, to the singular paucity of citation to evidence in support of the statements made in the petition both at this point and in the related portion of the Statement of the Case. (Pet., pp. 7-8).[40]

Two specific points in petitioner's political crimes discussion may be briefly treated.

First, petitioner says in a footnote that Chief Judge Whitehurst denied his motions for leave to take depositions in Venezuela and Europe, "which would have de-

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[40] Here, as in the lower courts, the discussion of Venezuelan history and the alleged motivation of President Betancourt consists mainly of counsel's assertions, quite unsupported by any evidence. This may account, in part, for some of the garbling of history, even of historical dates, in the petition's Statement of the Case. On page 8 of the petition—the principal portion of the Statement related to the later discussion of the so-called "underlying mosaic"—there are only four transcript citations, Tr. 4326, 3102-3105, 3659, and 4242. Tr. 4326 is a purported newspaper story that was never even offered in evidence. Tr. 3102-3105 is some worthless and remote hearsay about some specific acts of violence bearing literally no relationship to the text for which it is cited. Tr. 3659 is a purported "Intelligence" memorandum, author unknown, purporting to be dated June 1952, included in a large bundle of documents attached to an affidavit that was received into evidence; the memorandum states that there was a "pact" between the Accion Democratica of Venezuela and adherents of ex-President Prio of Cuba looking to "defeating the military regimes which exist in some countries on the Continent." And Tr. 4242 is a page of a memorandum filed by counsel with the extradition judge. This sort of thing reveals that the evidentiary basis for the petitioner's question—whatever the question may be—is pure quicksand.

veloped further the essentially political character of the alleged financial crimes." (Pet., p. 50 n.41). The facts are these: By stipulation or by waiver of objection, petitioner had introduced in evidence the five affidavits that he himself regarded as the most important among those made by the persons whose depositions he wished to take in Europe, and this was quite agreeable to the petitioner. (Tr. 3004, 3397, 3400, 3411, 3417). These affidavits were prepared with the thought of possible stipulation and so represented the strongest version of what the affiants would have deposed. (*Supra*, p. 8). As for the other prospective witnesses in Europe, we can only invite the Court to read the affidavits that were offered to show what their testimony would be (Tr. 2861-77, 2887-2901, 2917-24); they would have contributed literally nothing to the record about the financial crimes or anything else. The motion to take depositions in Venezuela covered only witnesses who would have testified about the murder charges and had nothing whatever to do with the financial crimes. (Tr. 3018-19).

Second, petitioner says that he was granted asylum in the United States, citing former Vice President Nixon's account in a recent book of how he explained petitioner's presence in the United States to persons with whom he talked in Caracas during his visit in 1958. (Pet., p. 51). The pertinence of the statement baffles. In any case petitioner was "granted asylum" only in the sense that he was allowed to enter this country on a visitor's permit for one month, later extended for a few days. He overstayed his permit and has been formally ordered deported; execution of the order has been withheld pending the outcome of this proceeding. So temporary does he himself regard his asylum that he is resisting having his income taxed as that of a resident.[41] Moreover, petitioner's an-

[41] This was brought out at page 88 of the record of the proceedings dealing with bail presented with the petitioner's application to the Chief Justice for release on bail.

thority, Mr. Nixon, reports in the same book from which petitioner quotes (Pet., p. 8, n.2) that he pointed out at a press conference during that same trip to Caracas "that there was an extradition treaty between our two countries and that the United States would be more than glad to ship the two men [petitioner and his police chief, then in the United States] back to Venezuela for trial whenever the present Venezuelan Government wanted to resort to the proper procedures." Nixon, *Six Crises* 224 (1962). See also testimony of Assistant Secretary of State Rubottom in *A Review of the Relations of the United States and Other American Republics*, Hearing before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 85th Cong., 2d Sess. 17 (1958).

III. OF THE PROCEDURAL ISSUES RAISED BY PETITIONER ONE IS NOT EVEN PRESENTED ON THIS RECORD AND IT AND THE OTHERS ARE WITHOUT MERIT AND OF NO GENERAL IMPORTANCE.

1. Petitioner contends that, because of the terms of his assignment to the Southern District of Florida, Judge Mathes had no jurisdiction to act in the extradition proceeding after February 29, 1960. (Pet., pp. 52-53). Since petitioner is held under the commitment of Chief Judge Whitehurst, not that of Judge Mathes, that question is not presented on this record. It is, moreover, dependent on unique facts of this case and thus is of no general importance. And it is quite unsubstantial. Further, petitioner is barred from raising it because he never objected on this ground to Judge Mathes' hearing of his case.

a. Petitioner is not prejudiced by any action taken by Judge Mathes in the extradition case before or after February 29, 1960. After Chief Judge Whitehurst entered the case, he proceeded in full awareness that he was not bound by the rulings of Judge Mathes. (Tr. 2995, 3400). And it is Chief Judge Whitehurst's order of commitment, entered upon his independent consideration of the case, of which

petitioner now complains. The most important of the orders entered by Judge Mathes that petitioner mentions, his order refusing to dismiss the proceeding on the basis of this respondent's evidence, which petitioner says "cannot stand," does not stand. It was explicitly made without prejudice to renewal of petitioner's motion to dismiss. (Tr. 2705). And that motion was in substance renewed in petitioner's very extensive closing argument to Chief Judge Whitehurst, in which he relied upon the identical memorandum that he had submitted in support of his motion to dismiss. (See *supra*, pp. 9, 10 n.9). Moreover, it is perfectly clear that Chief Judge Whitehurst considered himself free to exercise his independent judgment on the evidence. He found the evidence insufficient with respect to the murders (Pet. App., p. 36a), even though Judge Mathes had declined, on his consideration of this respondent's evidence, to dismiss the count of the complaint charging the murders.[42]

[42] The other principal action of Judge Mathes to which petitioner adverts (Pet., p. 51) is his receipt of this respondent's evidence, all of which was documentary. But petitioner made no objection to consideration of that evidence before Chief Judge Whitehurst; and even so Chief Judge Whitehurst gave independent consideration to the admissibility of that evidence, stating in his certification to the Secretary of State that the originals of the papers constituting the evidence were "certified by the principal United States diplomatic officer resident in Venezuela to be properly and legally authenticated so as to entitle them to be received for similar purposes in the tribunals of Venezuela, in accordance with 18 U.S.C. § 3190." (Pet. App., p. 36a). A certification complying with 18 U.S.C. § 3190 is conclusive of the admissibility of evidence submitted on behalf of the demanding government in extradition. Bingham v. Bradley, 241 U.S. 511, 517 (1916); Elias v. Ramirez, 215 U.S. 398, 409 (1910). Petitioner also mentions Judge Mathes' having authorized the filing of this respondent's second amended complaint and having issued his warrant of arrest thereon. Petitioner never moved to quash the warrant, and in any event any possible defect in it is immaterial since he is not now held under it. *Cf.* Kelly v. Griffin, 241 U.S. 6, 12-13 (1916). Moreover, Chief Judge Whitehurst in substantial effect

b. That Judge Mathes' last assignment in Florida ran out on February 29, 1960, except to "complete unfinished business," does not invalidate the filing of the second amended complaint permitted by him nine days later or the rearrest of the petitioner that he effected at that time. The petitioner says that "a completely new proceeding was thus instituted, one that cannot be described as the continuation of unfinished business previously pending before Judge Mathes." (Pet., p. 53). This is wholly unrealistic. Theretofore Judge Mathes had been living with the case since September 1959; the filing of the second amended complaint, which was in the progression of amendments to the complaint previously allowed and which was responsive to a motion for a bill of particulars that the petitioner had pressed at an earlier date, was only a step in the procedural evolution of the case in which, by February 29, Judge Mathes was deeply involved. The same, of course, is true of the rearrest, which was merely incidental to the filing of the amended complaint.

c. Petitioner never objected to Judge Mathes' having acted in the case after February 29, 1960. He objected neither to Judge Mathes himself while he was acting nor to Chief Judge Whitehurst or anyone else after Judge Mathes had removed himself, with the confirmation of the Fifth Circuit Judicial Council. He is precluded from raising the question now.

Constitutional questions aside—and petitioner divorces this point from his Article III constitutional argument—

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himself rearrested the petitioner. (Pet. App., p. 9a; *infra*, p. 58). Petitioner's objection to the second amended complaint (aside from an argument based on Article XII of the Treaty that he pressed throughout the proceeding until he reached this Court [see Pet. App., pp. 27a-28a]) was that it did not charge crimes named in the Treaty. (Tr. 895-96). Chief Judge Whitehurst found, independently of any prior decision by Judge Mathes, that the charges of financial crimes in the second amended complaint were of crimes named in the Treaty. (Pet. App., pp. 36a-37a).

Judge Mathes was unquestionably a member of one of the categories of judicial officers designated by 18 U.S.C. § 3184 to act in extradition and was at the least a *de facto* judge in the premises. The jurisdiction of a *de facto* judge may not be questioned for defects in his assignment or similar infirmities. *McDowell* v. *United States*, 159 U.S. 596, 601-02 (1895); *Ball* v. *United States*, 140 U.S. 118, 128-29 (1891). Certainly the attack cannot be made for the first time in connection with a collateral review proceeding. *Grin* v. *Shine*, 187 U.S. 181, 188 (1902); *Ex parte Ward*, 173 U.S. 452, 454 (1899). In the absence of non-frivolous constitutional argument or "a strong public policy concerning the administration of judicial business," the *de facto* doctrine applies to prevent a litigant from sitting by and awaiting the outcome of a law suit and then raising a question of the competency of the tribunal to act. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962). Petitioner asserts no such constitutional ground or strong public policy.

2. Petitioner also questions Chief Judge Whitehurst's jurisdiction and claims that he did not receive a full and fair hearing at his hands. (Pet., pp. 54-56). There is no substance to these contentions. They were fully answered by the Court of Appeals. (Pet. App., pp. 6a-13a).

Not only did petitioner fail to object to Chief Judge Whitehurst's conducting the extradition proceeding after Judge Mathes left the case, but he affirmatively agreed to the change in judges. At the first hearing before Chief Judge Whitehurst, his counsel said:

> "Unlike counsel, I won't address myself to the question of whether or not another judge should be assigned, because we have another judge assigned and that question is disposed of at the present time." (Tr. 2953-54).

In these circumstances the *de facto* doctrine is equally as applicable to this point as it is to petitioner's belated ob-

jection to the participation of Judge Mathes in the proceeding.

Moreover, under *Grin* v. *Shine*, 187 U.S. 181 (1902), and *Pettit* v. *Walshe*, 194 U.S. 205 (1904), it is clear that 18 U.S.C. § 3184 is not to be read so literally as to preclude anyone except the officer who receives a complaint and issues the warrant of arrest from proceeding thereafter in an extradition case. (See Pet. App., pp. 7a-8a). And finally, Chief Judge Whitehurst had the second amended complaint before him when he ordered the petitioner to appear before him on specific dates in order that the extradition case might be heard—without objection by the petitioner as to the form this effective warrant of arrest took. (Tr. 3013, 4214). As the Court of Appeals held, this fully satisfied the substantive requirement of the statute, if any there be, that Chief Judge Whitehurst establish his jurisdiction by the issuance—as the statute says—of "his warrant for the apprehension of the person so charged, that he may be brought before such . . . judge . . . to the end that the evidence of criminality may be heard and considered." (Pet. App., p. 9a). Chief Judge Whitehurst's orders that the petitioner appear before him amounted to precisely what the statute provides for. *Cf. Dallemagne* v. *Moisan*, 197 U.S. 169, 174-76 (1905).[43]

[43] It is hardly necessary to comment on petitioner's query as to whether Rule 63 of the Rules of Civil Procedure prevented Chief Judge Whitehurst from proceeding on "evidence admitted by another judge." (Pet., p. 54). None of the evidence received by Judge Mathes was by live witnesses; all of it was documentary. Everything was before Chief Judge Whitehurst anew that had been before Judge Mathes. Connelly v. United States, 249 F.2d 576, 580-81 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958); St. Louis Southwestern Ry. v. Henwood, 157 F.2d 337, 342-43 (8th Cir. 1946), *cert. denied*, 330 U.S. 836 (1947); Cahill v. Mayflower Bus Lines, 7 F. Supp. 869, 872 (S.D.N.Y. 1934), *aff'd*, 77 F.2d 838 (2d Cir. 1935), *cert. denied*, 296 U.S. 629 (1935). Rule 63 has no application.

The significance of Chief Judge Whitehurst's remark at an informal conference held for the purpose of settling the form of his certification to the Secretary of State that he had not "read all of the evidence" has been fully considered by the Court of Appeals (Pet. App., pp. 11a-12a) and does not raise a question meriting the attention of this Court. As the successor judge, Chief Judge Whitehurst took the steps he reasonably deemed necessary to familiarize himself with the record in the case. He had the benefit of exhaustive written analyses of the record by counsel on both sides; the petitioner's statement that the Chief Judge "ignored a memorandum previously submitted by petitioner's counsel" (Pet., p. 55; see also pp. 16, 19 n.7) is most misleading and flatly incorrect.[9] He also had the benefit of days of argument by counsel. All that Chief Judge Whitehurst said at the later informal conference was that he had not read all of the evidence, which, as we have explained, contained much material that did not need to be read, either because it was undisputed or because it was purely formal or repetitious or immaterial. (*Supra*, p. 9, n. 8). It bears emphasis that by the time Chief

[9] The writer of the petition has been led astray by the transcript of a discussion with Chief Judge Whitehurst at his initial conference with counsel. There counsel for this respondent had referred the Chief Judge to a memorandum he had previously filed on the evidence in the case and the Chief Judge expressed interest in it. Counsel for the petitioner then referred to a memorandum he had filed on his motion to dismiss before Judge Mathes. The Chief Judge indicated that he had no desire for that memorandum at that particular point. This is the passage in the transcript referred to at page 16 of the petition. But thereafter the Chief Judge gave *both parties* leave to file memoranda with him on all the evidence that had been received by Judge Mathes. Both parties in fact did so, before the evidentiary hearing before the Chief Judge began. Petitioner filed a slightly revised version of the memorandum he had filed on his motion to dismiss; it ran to more than 150 pages, plus appendices, and discussed the evidence in greatest detail. Then, after the petitioner's evidence was received he filed still another "fact memorandum" with the Chief Judge on that evidence. (See *supra*, pp. 8, 10

Judge Whitehurst entered the case the parties had cleared away much underbrush and had made many pages of the original evidentiary documents of the demanding government pure surplusage. In his certification to the Secretary of State, Chief Judge Whitehurst stated that he acted "upon consideration of all of the evidence submitted . . . ," and the fact that he acknowledged not having read every word in the evidentiary record does not justify going behind this solemn statement.

CONCLUSION

The most thoughtful attention has been given to this petitioner's case by able and conscientious judges and courts. The petitioner was afforded an unprecedented opportunity to prepare his defense (*cf.*, by contrast, *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383, 386-87 [S.D. Cal. 1959]) and to urge every possible argument, sometimes almost at leisure. After the earliest months of the case, when this respondent followed a course, in producing evidence and translations, designed to give the petitioner abundant advance notice (*supra*, pp. 6-7), this respondent has not been in the least responsible for the nearly four years the case has taken. That time does not speak well for the wieldiness of the extradition process. Substantial additional time should not now be added for consideration of the question presented by the petitioner under Article III of the Constitution, the only question seriously pressed. This respondent's Government did not select the judicial officer who determined its case. While it chose to bring its case to this country, both because of its Treaty and because it was assured that extradition process was available thereunder (*supra*, pp. 53-54), it was [redacted] hands of this country's authorities from that time forward with respect to the forum where its case was